Supreme Court, U.S.
FILED

05 - 787 DEC 19 2005

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term 2005

MICHAEL BRAD MAGLEBY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street, P.O. Box 850
Middletown, Maryland 21769
(301) 293-6822

MICHAEL WEIN
Attorney for Petitioner
7829 Belle Point Drive
Greenbelt, Maryland 20770
(301) 441-1151

QUESTIONS PRESENTED

Petitioner was convicted of conspiracy to violate civil rights and sentenced to 144 months, including a ten year enhancement for the "use" of fire under 18 U.S.C. § 844(h)(1), after he and a minor had engaged in a highly-publicized cross burning. Trial counsel objected at length to jury instructions that violated the First Amendment based on decisions of this Court and the Eighth Circuit, and argued for greater than thirty transcript pages that one cannot "use" fire to commit a conspiracy based on the common sense argument in *United States v. Hayward*, which presaged the Seventh Circuit's decision in *United States v. Colvin*. The trial judge himself recommended that the Government drop the enhancement charges. New counsel on appeal failed to present these well-preserved and obvious arguments, but instead unsuccessfully briefed ten issues involving (1) unobjected to jury instructions, (2) sufficiency arguments, and (3) evidentiary arguments.

1. Whether the *Strickland* and/or "dead-bang winner" standard applies to ineffective assistance of appellate counsel claims under 18 U.S.C. § 2255; if so, does this case satisfy that standard when appellate counsel failed to argue obvious, well-preserved issues likely to result in reversal in favor of weaker and unpreserved issues?

2. Whether Petitioner's convictions based solely on the message of a burning cross comply with the First Amendment where the judge refused to instruct the jury that it must find a true threat of imminent violence to convict, contrary to the "seminal" case of *United States v. Lee*, 6 F.3d 1297 (8th Cir., 1993) (*en banc*), and this Court's decisions on what constitutes a "true threat" of violence?

3. Whether a conspiracy to burn a cross under 18 U.S.C. § 241 is a predicate felony under 18 U.S.C. § 844(h)(1) where § 241 only makes criminal the agreement of the conspiracy itself and thus, as was found in *United States v. Colvin*, 653 F.3d 569 (7th Cir., 2003) (*en banc*), one does not "use" fire to conspire under § 241 to burn a cross?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
Case	v
Statutes	viii
Other Authorities	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
PROVISIONS INVOLVED IN THE CASE	1
Constitution of the United States	1
Statutes	2
STATEMENT OF THE CASE	6
Magleby's Original Trial and Appeal	6
Magleby's Motion Under 28 U.S.C. § 2255	10
The Decision of the United States Court Of Appeals for the Tenth Circuit	11
REASONS FOR GRANTING THE WRIT	14
I. The Tenth Circuit's Decision in *Magleby* Weakens the *Strickland* Criteria by Making The Overriding Criteria for Ineffective Assistance of Appellate Counsel the Controlling Case Law at the Time, Without Considering the Merits of a Well-Preserved Issue that Counsel Failed to Brief on Direct Appeal	17

II. The Tenth Circuit's Decision in Magleby Is Contrary to Numerous Decisions of this Court that Required the Judge to Instruct the The Jury that It Could Convict Magleby Only If He Intended a True Threat of Imminent Bodily Injury or Death 19

A. The Tenth Circuit's Holding that Magleby's Requested Instructions-Were Unsupported by Precedents-Other than the Eighth Circuit Is Contradicted by Numerous Decisions of this Court 20

B. As Applied by the Instructions, 18 U.S.C. § 241 (Count I) and 42 U.S.C. § 3631(a) Targeted Speech Protected by the First Amendment 22

C. The Undisputed Record Demonstrates a High Likelihood of Prejudice To Magleby from the Unconstitutional Instructions 26

III. The Seventh Circuit's *En Banc* Decision In *United States v. Colvin* Correctly Held that the Use of Fire Enhancement in 18 U.S.C. § 844(h)((1) Cannot Be Used When 18 U.S.C. § 241 Is the Predicate Felony 27

CONCLUSION 33

APPENDIX A

REPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED AUGUST 19, 2005 1a

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 20, 2005 22a

APPENDIX B

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH - CENTRAL DIVISION FILED JULY 8, 2003 22a

APPENDIX C

REPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 7, 2001 42a

APPENDIX D 72a

DEFENDANT'S PROPOSED INSTRUCTION NO. 6 72a

DEFENDANT'S PROPOSED INSTRUCTION NO. 10 74a

COURT INSTRUCTION NO. 17 76a

COURT INSTRUCTION NO. 18 79a

COURT INSTRUCTION NO. 19 80a

COURT INSTRUCTION NO. 20 82a

COURT INSTRUCTION NO. 21 84a

COURT INSTRUCTION NO. 22 87a

COURT INSTRUCTION NO. 23 88a

COURT INSTRUCTION NO. 24 89a

COURT INSTRUCTION NO. 25 90a

COURT INSTRUCTION NO. 26 91a

COURT INSTRUCTION NO. 27 93a

COURT INSTRUCTION NO. 28 94a

COURT INSTRUCTION NO. 29 95a

COURT INSTRUCTION NO. 33 96a

COURT INSTRUCTION NO. 34 97a

APPENDIX E - AFFIDAVIT OF TRIAL COUNSEL LELAND RONALD JORGENSEN IN SUPPORT OF DEFENDANT'S PETITION UNDER 28 U.S.C. § 2255 99a

TABLE OF AUTHORITIES

Cases Cited

Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995) ... 17

Boos v. Barry, 485 U.S. 312, 322 (1988). 23

Brandenburg v. Ohio, 395 U.S. at 444 (1969) 21, 24

Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995) 16, 17

Claudio v. Scully, 982 F.2d 798, 805 (2nd Cir. 1992) ..... .15

Evitts v. Lucey, 469 U.S. 387 (1985)..... 15

Gooding v. Wilson, 405 U.S. 518 (1972)..... 24

Gray v. Greer, 800 F.2d 644 (7th Cir. 1986)..... 17

Hardy v. United States, 375 U.S. 277, 282 (1964)..... 18

Houston v. Hill, 482 U.S. 451, 61 (1987)..... 24, 25

Hustler Magazine v. Falwell, 485 U.S. 46 (1988)..... 23

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)..... 22

Jones v. Barnes, 463 U.S. 745 (1983)..... 17

Lewis v. New Orleans, 415 U.S. 130 (1974)..... 24

Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999) 16

Matthews v. U.S., 485 U.S. 58 (1988)..... 29

Mayo v. Henderson, 13 F.3d 528 (2nd Cir. 1994)..... 17

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). 24

Neill v. Gibson, 278 F.3d 1044 (10th Cir. 2001).... 19, 20, 21

Neill v. Gibson, 278 F.3d 1044 (10th Cir. 2001 ..... 19, 20, 21

Pinkerton v. United States, 328 U.S. 640 (1946)..... 34

Plummer v. City of Columbus, 414 U.S. 2 (1973) 24

Rankin v. McPherson, 483 U.S. 378 (1987) 24

States v. [illegible]ini, 513 U.S. 10 (1994); 32

Strickland v. Washington, 466 U.S. 668 (1984). 12

Terminello v. Chicago, 337 U.S. 1 (1949) 23

Texas v. Johnson, 491 U.S. 397 (1989) 23

U.S. v. Migliaccio, 34 F.3d 1517 (10th Cir., 1994). 30

United States of America v. Michael Brad Magleby, 420 F.3d 1136 (10th Cir., 2005), *rehearing en banc* denied Sept. 20, 2005. 1

United States v. Colvin, 353 F.3d 569 (7th Cir. 2003) (*en banc*). 14

United States v. Cook, 45 F.3d 388 (10th Cir. 1995) 16.19

United States v. Hayward, 6 F.2d 1241 (7th Cir. 1993)..... 32

United States v. Lee, 6 F.3 1297 (8th Cir. 1993) (en banc) 21

United States v. Lee, 935 F.2d 952, 960 (8th Cir. 1991) (R. Arnold, J., dissenting), *rev'd en banc*, 6 F.3d 1297 (8th Cir. 1993)..... 13

United States v. Kozminski, 487 U.S. 931 (1988)..... 25

United States v. McDermott, 29 F.3d 404 (8th Cir. 1994)..... 21, 22

United States v. Michael Brad Magleby, 241 F.32 1306

(10th Cir., 2001) 1

United States v. Whitney, 229 F.3d (10th Cir. 2000) 32

Virginia v. Black, 538 U.S. 343 (2003) 10

Watts v. United States, 394 U.S. 705, 707 (1969). 25

Statutes Cited

18 U.S.C. § 241 passim

18 U.S.C. § 844(h)(1) passim

18 U.S.C. § 3631 passim

28 U.S.C. § 2255 passim

Other Authorities

Jennifer Golm, "Criminal Procedure: *Walker v. State* [933 P. 2d 327 (Okla. Crim. App. 1997)] – Dooming Challenges to Appellate Counsel's Effectiveness," 51 Okla. L. Rev. 601 Fall 1998 14

Lisa Griffin, "The Right to Effective Assistance of Appellate Counsel," 97 W. Va L. Rev. 1, Fall 1994 15

G. Fred Metos, "Appellate Advocacy: Selecting Issues to Argue on Appeal," 23 Champion 67, Sept./Oct. 1999 18

Petitioner Michael Brad Magleby respectfully petitions for a Writ of Certiorari to review the judgment below because the United States Court of Appeals for the Tenth Circuit has decided important questions in a way that conflicts with decisions of this Honorable Court, the United States Court of Appeals for the Seventh Circuit, and the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

Review is sought of *United States of America v. Michael Brad Magleby*, 420 F.3d 1136 (10th Cir., 2005), *rehearing en banc* denied Sept. 20, 2005. This reported opinion affirmed the decision of the district court to deny Magleby's motion under 28 U.S.C. § 2255, and is reproduced as Appendix A, along with the order of the Tenth Circuit denying Magleby's petition for rehearing.

The unreported decision of the United States District Court for the District of Utah to deny Magleby's motion under 28 U.S.C. § 2255 is reproduced as Appendix B.

The prior reported decision of the Court of Appeals that affirmed Magleby's conviction on direct appeal is *United States v. Michael Brad Magleby*, 241 F.32 1306 (10th Cir., 2001), and is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its decision on August 19, 2005. On September 20, 2005, the Court of Appeals entered an order denying Magleby's petition for rehearing. This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED IN THE CASE

Constitution of the United States

Amendment 1 – Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for redress of grievances.

Amendment 5 - Criminal Actions-Provisions Concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 - Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes

18 U.S.C. § 241. Conspiracy Against Rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured-

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravates sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 844. Penalties

(h) Whoever -

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 10 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

42 U.S.C. § 3631. Violations; penalties

Whoever, whether or not under color of law, by force or threat of force willfully injures, intimidates or

interferes with, or attempts to injure, intimidate or interfere with –

(a) any person because of his race, color, religion, sex, handicap (as such term is defined in section 802 of this Act [42 U.S.C. § 3602]), familial status (as such term is defined in section 802 of this Act [42 U.S.C. § 3602]), or national origin, and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings;

* * * * *

shall be fined under title 18, United States Code, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under title 18, United States Code, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under title 18, United States Code, or imprisoned for any term of years or for not life, or both.

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of this detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

Magleby's Original Trial and Appeal

The Government charged Petitioner Michael Brad Magleby in a five count superceding indictment after he erected and burned a cross next to the Salt Lake City, Utah yard of a biracial couple during the 1998 Labor Day weekend. Count I charged Magleby with conspiring "to oppress, threaten, and intimidate" the biracial couple in violation of 18 U.S.C. § 241. Count II charged him with a violation of the couple's federal housing rights under 42 U.S.C. § 3631(a). Count III charged him with using fire to

commit the conspiracy in Count I, a ten year sentencing enhancement under 18 U.S.C. § 844(h)(1), and Count IV charged him with using fire to commit the housing violation in Count II, also a ten year enhancement under 18 U.S.C. § 844(h)(1). Count V charged him with witness tampering.

Magleby's counsel moved to dismiss Counts III and IV, arguing that Congress did not intend the ten year enhancement under 18 U.S.C. § 844(h)(1) to apply to cross burning. He also moved to strike Counts I & II because they failed to specify that Magleby intended to advocate imminent force or violence or to threaten the Henrys so as to cause them to fear imminent force or violence. The court denied all of these motions, although it would later dismiss Count IV, the ten year enhancement under 18 U.S.C. § 844(h)(1) for using fire to commit the housing rights violation in Count II, at the request of the Government.

Undisputed evidence introduced at the six day trial showed that Magleby and his 15 year old friend L.M. constructed a wooden cross during a holiday weekend of drinking and painkillers, planning to ignite the cross at the home of a Tongan gang who had earlier assaulted Magleby. Magleby's friends watched Magleby and L.M. as they assembled the cross, and discussed their plans for it.

Magleby and L.M. put the finished cross in Magleby's Jeep, and drove over to the Tongans' home. But when they saw gang members standing watch, they changed their minds and drove off with the unburned cross. L.M. told Magleby that he knew where a "crackhead" lived. The "crackhead" was Ronald Henry, an African-American who had allegedly bought cocaine from Merriam's father, and who resided in the city with his Caucasian wife and 11 year old son. Magleby did not know Henry, and L.M. testified that he did not disclose Henry's race to Magleby.

L.M. and Magleby drove to Henry's home. Magleby propped the cross against the Henrys' chain-link fence, sprinkled gasoline on it, ignited it, and the two quickly drove off. The cross burned for less than 30 seconds, and woke up the Henrys.

The Government's theory, presented by its witnesses and its counsels' arguments, was that the burning cross is a message of racial hatred and exclusion, and that Magleby had displayed it solely to communicate such a message. As support for this theory, prosecutors introduced testimony from Magleby's former friends that Magleby possessed white supremist literature, had viewed the movie "Mississippi Burning," visited racist web sites, listened to racist music, and made racist slurs.

Magleby testified that he did not know the Henrys, and did not intend to intimidate or threaten them. He explained that he had built the cross while drunk to retaliate against the Tongan gang who had attacked him and to impress his peers. He admitted that he had wanted to "rile people up" and attract media attention, but he did not consider the Henrys' reactions until after he sobered up. He denied his former friends' testimonies that he possessed white supremist literature, visited racist web sites, listened to racist music, used racist slurs, or asked them to lie to investigators. Evidence showed that Magleby is part American Indian, and that his cross burning accomplice L.M. is an Armenian whom prosecution witnesses had called a "little rat," "filth," and "sand nigger." Character witnesses - including a Samoan and an African-American co-worker - testified that Magleby is not a racist.

Following the Government's case and again at the close of all of the evidence, Magleby's counsel moved for acquittal, arguing that the conspiracy and housing violation statutes underlying Counts I and II were being applied unconstitutionally to proscribe speech; that Congress did not intend the term "fire" in § 844(h)(1) to apply to symbolic speech such as cross burning; and that the use of fire to burn a cross was not an element of the conspiracy under the plain language of 18 U..S.C. § 241, making the § 844(h)(1) enhancement under Count III inapplicable to Count I. The court again denied Magleby's motions.

Prior to deliberations, Magleby's counsel requested the judge to instruct the jury that cross burning may be protected speech under the First Amendment, and that

decisions of this Court and the Eighth Circuit required the jury to find that Magleby acted with the intent to incite imminent lawless action or to arouse fear of such imminent violence in order to convict him. The judge denied these requests, expounding that "free speech rights do not extend to this type of act." The judge refused to allow Magleby's counsel to argue to the jury that "the right of free speech extends to even the speeches and symbols of a group of drunken boys."

After deliberating late into the night, the jury convicted Magleby on all counts. Before sentencing, the Government moved to dismiss Count IV, the § 844(h)(1) ten year enhancement to the housing rights violation, and Magleby's counsel moved to dismiss Count III, the enhancement to the Count I conspiracy. Magleby's counsel again arguing that Congress had not intended the § 844(h)(1 enhancement to apply to the use of fire to burn a cross. The judge granted the Government's motion to dismiss Count IV, but denied Magleby's motion to dismiss Count III.

The judge sentenced Magleby to 144 months, including the ten year enhancement under Count III. After retaining new counsel, Magleby appealed, but did not raise any of the First Amendment or statutory construction arguments that trial counsel had repeatedly urged in his motions to dismiss, for acquittal, and jury instructions.

The United States Court of Appeals for the Tenth Circuit affirmed in a reported decision, ruling that the judge had not committed plain error when he instructed the jury that to convict Magleby it had to find that he had acted because of the Henrys' race and residency. *United States v. Magleby*, 241 F.3d 1306, 1309-10 (10th Cir. 2001). App 46a-49a Likewise, the court concluded that the judge had not erred by instructing the jury that it could consider the reactions of the victims and other witnesses in determining Magleby's intent. *Id.* at 1311. App 49a-51a Finally, the court ruled that the evidence was sufficient to support the convictions and that various evidentiary rulings were either not sufficiently prejudicial to reverse the verdict or not erroneous in the first instance. *Id.* at 1311-20. App 51a-72a

Magleby's Motion Under 28 U.S.C. § 2255

Magleby timely filed a motion to vacate his conviction under 28 U.S.C. § 2255. His motion alleged that he had been prosecuted for the expressive act of cross-burning in violation of the First Amendment; that the ten year enhancement under 18 USC § 844(h) for the use of fire to burn a cross violated the First Amendment; and that he did not use fire to conspire under 18 U.S.C. § 241 because the objective of the conspiracy to burn a cross was not a statutory element of the underlying conspiracy for which he head been convicted. Because these arguments had not been raised during his direct appeal, Magleby also asserted that he had received ineffective assistance of appellate counsel.

On July 18, 2003, the trial court issued an opinion and order denying Magleby's motion. It acknowledged that Magleby's First Amendment and § 844(h) enhancement arguments - which had not been argued in his direct appeal - would not be procedurally barred if his appellate counsel had been ineffective. App 25a-27a It then turned to the substance of his arguments. The court incorrectly stated that the Supreme Court had recently found Virginia's cross burning statute to be "consistent with the First Amendment of the Constitution." App 29a *See Virginia v. Black*, 538 U.S. 343 (2003).[1] It did not directly respond to Magleby's argument that the First Amendment had required it to warn the jury that it could convict him only if he intended to incite imminent lawless action or arouse fear of such imminent force or violence, and it rejected his contention

---

[1] The Supreme Court decided *Virginia v. Black* - this Court's latest First Amendment cross burning case - after Magleby filed his motion under 28 U.S.C. § 2255 but before the district court issued its ruling. Thus, contrary to the later appellate decision of the Tenth Circuit upholding the district court's denial of Magleby's motion, Magleby could not and did not rely on *Virginia v. Black* as the basis for his motion, only as the latest application of prior Supreme Court decisions concerning when a cross burning is a "true threat" of violence outside of the First Amendment.

that the instructions it had given were overbroad by allowing a conviction based on protected speech. App 28a-37a It rejected Magleby's contention that application of the ten year fire enhancement under § 844(h)(1) to cross burning violated the First Amendment, and it also rejected his argument a section 241 conspiracy to burn a cross could not be a predicate offense for the enhancement. App 37a-41a

Pursuant to 28 U.S.C. § 2255, Magleby timely noted an appeal from the trial court's denial of his motion.

The Decision of the United States Court of Appeals for the Tenth Circuit

The United States Court of Appeals again affirmed, although this time on different grounds than those specified by the district court. *United States of America v. Michael Brad Magleby*, 420 F.3d 1136 (10th Cir. 2005), *rehearing en banc* denied Sept. 20, 2005. App 1a-22a The court agreed with Magleby that "Free speech is not limited to views tolerable to a minority" and that "cross burning may be speech protected by the First Amendment." But it found that he had "missed his best opportunity to raise this issue -namely on his direct appeal." App 4a The court held, however, that he could still overcome the procedural bar resulting from this omission if he could prove ineffective assistance of appellate counsel using the criteria for ineffectiveness of trial counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

To evaluate Magleby's claim of ineffectiveness, the court began by reviewing the instructions for Count II, the housing rights violation under 42 U.S.C. § 3631(a), even though the trial judge had preceded these instructions with the instructions for Count I, the 18 U.S.C. § 241 charges. App 8a, 76a-95a The court's reversal of order for these instructions allowed it to avoid explaining the damage from the overbroad "threaten" and "intimidate" elements of § 241 as defined in the Count I instructions. In discussing the parallel language under § 3631(a), the trial judge had said "***As I instructed you before,*** to threaten or intimidate does not require the possibility of physical force or violence."

(*Emphasis added.*) [Court Instruction No. 28, found at App 9a & 94a] Thus the trial judge incorporated his preceding instructions for the § 241 charges - which as shown below were obviously flawed - into the § 3631(a) instructions for Count II. Ignoring this circular confusion, the Tenth Circuit concluded that appellate counsel's failure to pursue these flaws in the Count II instructions was not ineffective. "Perhaps an appeal on this ground would have succeeded, but counsel could also reasonably fear that the issue was more likely to distract the appellate court's attention from issues with a greater likelihood of success." App 11a

The court then turned back to the § 241 instructions for Count I. App 11a The court readily conceded that these instructions failed to withstand First Amendment scrutiny:

"We agree with Mr. Magleby that these instructions are flawed. They never define threat as requiring a threat of force; to the contrary, they assert that *oppress, threaten,* and *intimidate* are used in their everyday sense. Many acts short of unlawful violence may constitute oppression or intimidation in the everyday sense of these words. As Judge Richard Arnold put it:

> If, instead of burning a cross. . .the defendant had distributed leaflets. . . stating that the Ku Klux Klan was in the neighborhood, disliked black people, and wanted them to move out, the black residents. . . could well have been threatened or intimidated in the sense allowed by the District Court's instructions to the jury in this case.

United States v. Lee, 935 F.2d 952, 960 (8th Cir. 1991) (R. Arnold, J., dissenting), *rev'd en banc,* 6 F.3d 1297 (8th Cir. 1993)." App 13a

But the court nevertheless rejected Magleby's claim for relief, speculating without testimony or supporting authority that his appellate counsel may have believed that such an error "is likely to be considered harmless" and that such "likelihood is considerable here" due to the less obviously flawed § 3631 instructions for Count II. The court did not explain how those subsequent instructions could

render the § 241 error underlying Count I harmless since the § 3631 instructions themselves incorporated the flawed § 241 explanation. ("***As I instructed you before***, to threaten or intimidate does not require the possibility of physical force or violence." App 9a, 14a, 94a Indeed, the appellate court overlooked the fact that judge had even repeated the same words when defining the § 3631 elements "intimidate" and "interfered with" that it had found most obviously flawed in the § 241 instructions, stating that these words have no technical meaning, are understood in their "ordinary" meaning, and "cover conduct intended ***to frighten or harass*** other persons." App 13a, 95a

The court then addressed Magleby's contention that the ten year enhancement under 18 U.S.C. § 844(h)(1) was unlawfully applied. App 14a-17a After enumerating the hazards of fire, the court concluded that Magleby's argument that the First Amendment proscribed application of the use of fire enhancement to a cross burning was "highly questionable." App 16a Based on this conclusion, the court held that counsel's failure to raise this issue on direct appeal was not ineffective. App 17a

And finally, the court ruled that the failure of appellate counsel to argue that the Count I § 241 conspiracy could not be a predicate felony to the 18 U.S.C. § 844(h)(1) sentencing enhancement was not ineffective. App 17a-19a The court acknowledged that the *en banc* Seventh Circuit has ruled that "§ 844(h)(1) does not apply to a conspiracy offense that does not require an overt act unless fire was used in the process of agreement(.)" App 17a *See United States v. Colvin*, 353 F.3d 569, 575-76 (7th Cir. 2003) (*en banc*). But after further discussion, the court concluded that whatever the merits of this argument, "it was not so obvious at the time of his direct appeal that counsel's failure to raise it was unreasonable." App 18a The court also disagreed with Magleby's reading of the transcript, in which the judge had repeatedly expressed doubt about the applicability of § 844(h)(1) to § 241. App 19a

REASONS FOR GRANTING THE WRIT

This Court held in *Evitts v. Lucey*, 469 U.S. 387 (1985) that the due process clause embodies a right to effective assistance of appellate counsel in a case where the defendant was denied his right to appeal because his appellate counsel had procedurally defaulted. *Id.* at 389-390. However, this Court left open the question of what standards apply to ineffective assistance of appellate counsel. *Evitts*, at 392 ("We therefore need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel."] In the twenty years since *Evitts*, all of the Circuit Court of Appeals have stated that this should be the *Strickland* standard,[2] though different circuits have adopted "modified *Strickland*" standards, such as the "dead-bang" winner standard articulated by the Tenth and Eleventh Circuits. *See e.g., United States v. Cook*, 45 F.3d 388,

---

[2] At least one state appellate court has adopted a standard for effectiveness of appellate counsel cases that does not follow *Strickland*. *See* Jennifer Golm, "Criminal Procedure: *Walker v. State* [933 P. 2d 327 (Okla. Crim. App. 1997)] - Dooming Challenges to Appellate Counsel's Effectiveness," 51 Okla. L. Rev. 601, 613 Fall 1998 (Noting three-pronged *Walker* test precludes the need to review the merits of the omitted appellate issue, and "[h]ad Walker landed in any court still using the *Strickland* test, he would have succeeded in his challenge...") In addition, a 'pure' *Strickland* standard is arguably inappropriate in ineffective assistance of appellate counsel claims, because concerns underlying *Strickland* (of the need for deference to trial counsel's legal strategy, as well as matters that may not be in the record such as discussions with the client) do not overly affect the strategy of criminal appellate lawyers whose decisions are almost totally based upon a review of the trial record, which can be reproduced for review. Thus, it has been recommended that this Court should "adopt but redefine" *Strickland's* "reasonable competence" standard to appellate counsel, and reject the use of *Strickland's* prejudice element as a redundant layer that is unnecessary in light of the varying criteria for prejudice such as harmless error used by appellate courts to assess error in a direct appeal. Lissa Griffin, "The Right to Effective Assistance of Appellate Counsel," 97 W. Va L. Rev. 1, 51, Fall 1994.

395 (10th Cir. 1995).[3] *See also Mapes v. Coyle*, 171 F.3d 408, 427-428 (6th Cir. 1999) (outlining eleven elements a court should consider to determine whether appellate counsel performed competently); *Claudio v. Scully*, 982 F.2d 798, 805 (2nd Cir. 1992) (It is ineffective assistance of appellate counsel when no "reasonably competent attorney should have missed [raising the omitted issue. It therefore] cannot be viewed reasonably as a strategic decision.") Furthermore, the lack of specificity from this Court has led to diverse applications by the circuits of the *Strickland* standard to post-conviction claims of ineffective assistance of appellate counsel. *Cf. Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) ("when a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue."); *Gray v. Greer*, 800 F.2d 644 (7th Cir. 1986); and *Mayo v. Henderson*, 13 F.3d 528 (2nd Cir. 1994) (requiring comparison between merits of raised and unraised claims before determining effectiveness of appellate counsel).

This Court has never previously granted certiorari to explain the ineffective assistance of appellate counsel criteria or concept beyond holding that a defendant is denied effective assistance of appellate counsel when counsel defaults on his appeal at the expense of the due process rights of their client. *Jones v. Barnes*, 463 U.S. 745 (1983) notes that the decision of what issues to raise on appeal rests with

---

[3] "Conversely, an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a "dead-bang winner," even though counsel may have presented strong but unsuccessful claims on appeal....we conclude [a dead-bang winner] is an issue which was obvious from the trial record, *see. e.g. Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (counsel's failure to raise issue which 'was obvious on the record, and must have leaped out upon even a causal reading of [the] transcript' was deficient performance), and one which would have resulted in a reversal in appeal. By omitting an issue under these circumstances, counsel's performance is objectively unreasonable because the omitted issue is obvious from the trial record. Additionally, the omission prejudices the defendant because had counsel raised the issue the defendant would have obtained a reversal on appeal." *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995)

appellate counsel exercising reasonable professional judgment. While it is no doubt true that it is the role of an effective appellate advocate to winnow out weaker issues in favor of stronger issues, this judgment cannot be subject to absolute deference without sacrificing Constitutional protections established by the Fifth and Sixth Amendments to the United States Constitution. In the case *sub judice*, there cannot be any tactical advantage for appellate counsel choosing to submit ten clearly weaker issues on appeal, versus two issues subject to at least *de novo* review that would have likely resulted in reversal.[4]

Without the development of standards for appellate advocacy competency, such as (1) stressing the need to review and brief issues preserved and argued in the trial record,[5] (2) legal research on the present state of the law, and (3) the need to examine standards of review involved with the claimed error, the field of appellate advocacy in criminal appeals will suffer, leading to scarce judicial resources being expended needlessly to compensate later for previous deficient appellate counsel. (As well as lowering the overall level of justice that would otherwise rise when an appellate attorney successfully argues those issues presented in trial.) A grant of certiorari in this case, with obvious and important

---

[4] As noted in the affidavit of trial counsel in the § 2255 petition, "[a]s shown by the attached docket from the United Stats Court of Appeals for the Tenth Circuit, Magleby's new counsel missed court-ordered deadlines for submitting the appellant's brief at least three different times, twice after the court had already notified counsel that he would not be allowed any further extensions. Moreover, Magleby's counsel twice field deficient briefs, resulting in further extensions of time and orders for the filing of a corrected brief and appendix." App 110a

[5] "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting *the most promising* issues for review." [*Emphasis added*] *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Furthermore, "the most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy." *Hardy v. United States*, 375 U.S. 277, 282 (1964).

First Amendment and legislative construction issues, provides a clear backdrop against which to illustrate the appropriate touchstones on which an appellate attorney should base his/her competence, judgment, and practice.

I. The Tenth Circuit's Decision in *Magleby* Weakens the Strickland Standard by Making the Overriding Criteria for Ineffective Assistance of Appellate Counsel the Controlling Case Law at the Time, Without Considering the Merits of a Well-Preserved Issue that Counsel Failed to Brief on Direct Appeal

The Tenth Circuit's decision in *Magleby* fails to follow the circuit's own standards for adjudicating ineffective assistance of appellate counsel, as set forth in *United States v. Cook*, 45 F.3d 388 (10th Cir. 1995) and *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001). *Magleby* does not once recite the "dead-bang winner" criteria that the Tenth Circuit had previously adopted as its criteria for determining ineffective assistance of appellate counsel. *United States v. Cook, supra* 45 F.3d at 395 ("[E]ven though counsel may have presented strong but unsuccessful claims on appeal," it can be ineffective assistance of appellate counsel to omit a "dead-bang winner.") This criteria provides a fair, reasonable, and concrete method for a court to evaluate the performance of appellate counsel. Thus "we conclude [a 'dead-bang winner'] is an issue which was "obvious from the trial record...and must have leaped out upon even a causal reading of the transcript...and one which would have resulted in a reversal on appeal." *Id.* at 395 (*quoting Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987)).

Yet with respect to the applicability of the fire penalty enhancement to a non-overt act common law-based § 241 conspiracy, the Tenth Circuit held that "***[w]hatever the merits of Mr. Magleby's § 844 (h)(1) contention,*** it was not so obvious at the time of his direct appeal that counsel's failure to raise it was unreasonable." *Magleby*, 420 at 1145. While acknowledging the First Amendment analysis in *United States v. Lee*, (but ignoring the fact that the Seventh Circuit's

prior decision in *Hayward* significantly strengthened the likelihood of a reversal based on statutory construction had that argument been presented on appeal), *Magleby* implicitly holds that the omission of an issue on appeal that lacks a direct precedent, no matter how well preserved or obvious, is *never* ineffective assistance of counsel. *Id.*

But this contradicts the dead-bang winner standard in *United States v. Cook*, and *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001).[6] It also contradicts *Strickland v. Washington*, 466 U.S. 668 (1984), which stressed the need for an 'objective' standard for ineffective assistance of trial counsel. With respect to *appellate* counsel, nothing is more 'objective' to illustrating ineffectiveness than appellate counsel's failure to present obvious and well-preserved issues brought out in trial on appeal. This is particularly true where, as in this case, the actual ten issues briefed by appellate counsel during the direct appeal were clearly weaker, and required the appellant to overcome the most arduous standards of review in order to succeed.[7] *See United States v. Magleby*, 241 F.3d 1306 (10th Cir. 2001).

---

[6] "This court has expressed this test in terms of appellate counsel's omitting a "dead-bang winner," often defined in part as a claim that "would have resulted in a reversal on appeal." To the extent this language can be read as requiring the defendant to establish that the omitted claim would have resulted in his obtaining relief on appeal, rather than there being only a reasonable probability the omitted claim would have resulted in relief, this language conflicts with *Strickland*. The en banc court, therefore, expressly disavows the use of the "dead-bang winner" language to imply requiring a showing more onerous than a reasonable probability that the omitted claim would have resulted in a reversal on appeal." [citations omitted] *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001).

[7] *See* G. Fred Metos, "Appellate Advocacy: Selecting Issues to Argue on Appeal," 23 Champion 67, Sept./Oct. 1999 ("The standard of review should be considered in assessing the viability of potential appellate issues. It is far more difficult to prevail on an issue that is subject to an abuse of discretion standard than it is to

Practicing criminal appellate attorneys have a hard enough time arguing appeals when, as is usually the case, the trial attorney fails to object or preserves issues in the trial court. However, when a trial counsel appropriately, strenuously, and repeatedly objects to jury instructions in a *cross burning* case that run afoul of the First Amendment and are in the words of the Tenth Circuit's decision in *Magleby*, 'flawed,' as well as arguing for greater than 30 pages of transcript that a Count in the Indictment should be dismissed, (and even the trial judge himself recommended that the Government drop the Count), *and the appellate counsel fails to present these obvious reversible issues on appeal,* respectfully, this is textbook ineffective assistance of appellate counsel, under both this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and the Tenth Circuit's decisions in *United States v. Cook*, and *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001). Without review by this Court, there will continue to be uncertainty amongst the Circuits as to what 'form' of *Strickland* should be applied to ineffective assistance of appellate counsel claims and how this form works in practice.

II. The Tenth Circuit's Decision in *Magleby* Is Contrary to Numerous Decisions of this Court that Required the Judge to Instruct the Jury that It Could Convict Magleby Only if He Intended a True Threat of Imminent Bodily Injury or Death

Although the Tenth Circuit conceded that the Count I § 241 instructions were flawed under the "seminal decision" of *United States v. Lee*, 6 F.3 1297 (8th Cir. 1993) (en banc) and its "strict" application in *United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994), it held that appellate counsel was not ineffective in part because of "the absence

---

prevail on one that is subjected to *de novo* review. Likewise, a challenge to the sufficiency of the evidence to support a conviction is subject to a high standard of review. Most courts employ a test that no reasonable juror could differ in the result.")

at the time of the appeal of any authority from the Supreme Court or this circuit adopting the law set forth in the Eighth Circuit cross-burning decisions." App 5a-7a, 13a-14a It similarly found that appellate counsel was not ineffective for challenging the Count II § 3631 instructions based on First Amendment precedents, characterizing the flaw in the court's definitions as "not immediately apparent to us" and any overbreadth as a "subtle flaw." App 10a It also minimized the precedential value of *Virginia v. Black*, 538 U.S. 343 (2003), this Court's latest cross burning case: "But his counsel on direct appeal can hardly be faulted for not pointing out the requirements of Black, which was decided two years after our decision in Mr. Magleby's appeal."

The Tenth Circuit's rationale, however, ignored Magleby's primary First Amendment claim challenge – that the judge refused to deliver any instructions, even after being requested by Magleby's trial counsel, that informed the jury that it could convict him only if it found that he intended a "true threat" as defined by numerous, well-established precedents of this Court. App 72a-75a

A. The Tenth Circuit's Holding that Magleby's Requested Instructions Were Unsupported By Precedents Other Than the Eighth Circuit Is Contradicted by Numerous Decisions of this Court

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court's last cross burning case before Magleby's trial, this Court held that an ordinance that criminalized the burning of a cross that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender" violated the First Amendment. Although the Court split into different rationales, all nine justices agreed that cross burning is speech that may only be prosecuted in a manner consistent with the First Amendment. *Id.* at 396. "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavored topics." *Id.* at 391. These "specific disfavored topics" include categories of obscenity,

defamation, and "fighting words" or "true threats." But even these categories are not invisible to the First Amendment, and the Government may not proscribe subcategories of such speech simply based on its disapproval of a particular viewpoint. *Id.* at 383-386.

R.A.V.'s conclusion that even the despised message of a cross burner may be protected speech followed numerous other precedents of this Court. If such speech were unprotected, the "legislatures, courts, or dominant political or community groups" would become the arbiters of what ideas are acceptable and may be expressed. *Terminello v. Chicago,* 337 U.S. 1, 4 (1949). "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech, in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry,* 485 U.S. 312, 322 (1988). This Court repeatedly ruled long before Magleby's appeal that both verbal and non-verbal communications, no matter how disgusting, bigoted, or crude, are protected speech. *See, e.g. Texas v. Johnson,* 491 U.S. 397 (1989) (burning U.S. flag); *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988) (grossly offensive parody intended to inflict injury); *Rankin v. McPherson,* 483 U.S. 378 (1987) (expression of hope that President would be assassinated); *Lewis v. New Orleans,* 415 U.S. 130 (1974) (profanity towards police officers); *Plummer v. City of Columbus,* 414 U.S. 2 (1973) (sexual statements by cabbie to passenger); *Gooding v. Wilson,* 405 U.S. 518 (1972) (threats of violence and racist profanity to police); *Cohen v. California,* 403 U.S. 15 (1971) (jacket bearing "Fuck the Draft"); *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (cross burning, exhortations to "bury the niggers, "the niggers should be returned to Africa," and "send the Jews back to Israel"). Such speech may only be banned when it is 'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Houston v. Hill,* 482 U.S. 451, 61 (1987).

"Thus the Government may prosecute a cross burner based on the threatening message that he conveys only

when it proves that he intends - by that message - to incite imminent lawless action or cause fear of such imminent force or violence. *Brandenburg v. Ohio, supra,* 395 U.S. at 447-49; *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 927-29 (1982). It must prove such a symbolic act to be a "true" threat of bodily harm or death, not hyperbole, offensiveness, or even ugly-spirited racism. "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States,* 394 U.S. 705, 707 (1969).

On its face, 18 U.S.C. § 241 potentially proscribes protected speech, as it prohibits any conspiracy to "injure, oppress, threaten, or intimidate" without limiting these elements to acts "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Houston v. Hill, supra,* 482 U.S. at 461. 42 U.S.C. § 3631(a) - underlying Count II - is also potentially overbroad, as it criminalizes interference with housing rights "by threat of force."

Unless the jury instructions narrow these statutes to preclude a conviction for protected speech, they cannot be used to prosecute the message communicated by a cross burning. *See, e.g. Brandenburg v. Ohio, supra,* 395 U.S. at 448-49 (jury instructions must be considered to determine whether a statute criminalizing speech has been applied consistently with the First Amendment); *Terminiello v. Chicago, supra,* 337 U.S. at 1 (breach of peace conviction reversed where instructions allowed conviction if speech stirred people to anger, invited public dispute, or caused unrest). *Cf. United States v. Kozminski,* 487 U.S. 931, 944 (1988) (instructions must narrow § 241 conspiracy to require proof of physical force or legal coercion.)

B. As Applied by the Instructions, 18 U.S.C. § 241 (Count I) and 42 U.S.C. § 3631(a) (Count II) Targeted Speech Protected by the First Amendment

The trial judge never delivered an instruction that stated the elements of a "true threat" necessary to find Magleby's speech outside of the First Amendment. Rather

than narrowing 18 U.S.C. § 241 to target a threat made with "the intent of placing the victim in fear of bodily harm or death" - *Virginia v. Black, supra,* - the judge broadened section 241 to suggest that the jury only had to find that Magleby intended to harass his audience. Instead of explaining the heightened criteria for a true threat under First Amendment jurisprudence, the judge suggested that the "oppress, threaten, or intimidate" elements of § 241 were to be construed as broadly as possible, and did not require an imminent threat of violence. App 87a Instruction No. 21 stated that it was unnecessary for the jury to find that the defendant intended "to force the victims to move from their home" in assessing his intent. App 86a Instruction No. 22 minimized "oppress, threaten or intimidate," stating that such words "are not used in any technical sense," and that they are used "in their ordinary meaning to cover a variety of conduct." App 87a Instruction No. 22 equated a finding that Magleby intended to "threaten, frighten, or harass" with a finding that he willfully intended to "oppress, threaten, and intimidate." App 87a

This was an unsubtle message that these terms should be construed as broadly as they are in ordinary life, where synonyms like "oppress," "threaten," "intimidate," "frighten", and "punish" are bandied about to apply to all kinds of non-violent speech ranging from a mother's scoldings to a lawyer's threats of litigation to government warnings of terrorism to hand gestures on the road to "attack" ads threatening dire consequences from electing the opposition.[8] Such a message also signaled the jury that the law is imprecise, that the words used by the judge to explain it are not important, and that the jurors should employ their own "commonsense" intuition. One can only imagine the short thrift that an appellate court would give

---

[8] Even formal definitions for these synonyms are broader in scope than a "true threat." For example, Webster's Dictionary defines "oppress" in part as "to weigh heavily on the mind, spirits, or senses of; worry; trouble." Webster's Dictionary defines "intimidate" as "to make timid; make afraid; daunt."

to a homicide conviction if the trial judge informed the jury that murder and manslaughter elements such as premeditation, general intent, reckless indifference, etc. were not "used in any technical sense" and should be considered using "ordinary meanings" rather than those assigned by law.

The judge next instructed the jury with a declaration that was blatantly and prejudicially false when construed using the "ordinary meaning" that the jury was most likely to have assigned: "To oppress, threaten or intimidate does not require the possibility of physical force or of physical harm." App 87a This declaration was false because even at the time of Magleby's appeal the First Amendment only permitted a conviction for cross-burning when the Government proved that the defendant intended to either incite imminent physical violence leading to bodily injury or death, or to cause a reasonable fear of such imminent physical violence. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-29 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *U.S. v. Lee, supra*, 6 F.3d at 1300-04. In other words, a defendant cannot be convicted for burning a cross unless the Government proves that he intended to threaten *"the possibility of physical force or of physical harm,"* or to cause others to reasonably fear *"the possibility of physical force or of physical harm."*

The judge's contrary suggestion could only be correct in the narrowest, most "technical" sense; that proof of an actual "possibility of physical force or physical harm" would be unnecessary provided that the defendant intended to threaten such violence or cause a reasonable fear of such violence without having any means of using actual physical force or causing physical harm. But the instruction was directly contrary to the First Amendment using the "ordinary meaning" most likely understood by the jury; that "oppress, threaten or intimidate" did not require proof of a violent threat or even a reasonable fear of the "possibility of physical force or of physical harm."

The trial court's unfortunate erosion of the elements required for a conviction based on the act of cross burning

did not end with the judge's misstatement concerning the "possibility of physical force or of physical harm." The judge immediately followed this misstatement by expressly reiterating that the jury should construe the salient elements of § 241 much broader than a threat of violence: "If you find there was a conspiracy whose plan was to burn a cross, and you find that the conspirators intended the cross-burning to threaten, frighten *or harass the victims*, then you may find that the conspirators willfully acted "to oppress, threaten, and intimidate." App 87a Webster's Dictionary defines "harass" as meaning "to trouble, worry, or torment, as with cares, debts, repeated questions, etc."

The trial court's final instruction concerning 18 U.S.C. § 241 confirms the unconstitutional sweep of these instructions "when read as a whole." Instruction 24 emphasized that the Government needed to only prove the broadest single alternative definition of "oppress, threaten and intimidate" – not any of the elements of a "true threat" - in order to secure a conviction:

"Although the Superceding Indictment alleges that the statutes in question were violated by various acts which are in the Superceding Indictment joined by the conjunctive "and," it is sufficient for guilt if the evidence establishes beyond a reasonable doubt the violation of the statute by any one of the acts charged. For example, Count I of the Superceding Indictment alleges that the defendant conspire to "oppress, threaten and intimidate" Ron Henry and Robyn Henry. *The proof need only establish that the defendant conspired to oppress or threaten or intimidate any one or more of these specified victims."* [*Underlining in original. Emphasis added.*] App 89a

The trial judge's failure to inform the jury that it had to find that Magleby intended a "true threat" under the decisions of this Court continued with the instructions under 42 U.S.C. § 3631(a) (Count II). No matter how anyone slices, dices, and reassembles these instructions, nowhere appears any language, synonyms, or explanation that informed the jury that it could only convict Magleby if he

intended to threaten imminent bodily harm or death, or cause reasonable fear of bodily harm or death. App 94a

Indeed, like the instructions under § 241, the court's § 3631 instructions implied just the opposite, defining "threat of force" to exclude proof of the possibility of physical force or harm: "While 'force' itself requires some physical manifestation of violence, 'threat of force' falls short of actual violence and ordinarily signifies the expression of one person's intention to act against another or to do some harm. *As I instructed you before, to threaten or intimidate does not require the possibility of physical force or physical harm."* [*Emphasis added.*] App 94a Indeed, the Tenth Circuit overlooked the fact that the judge even repeated the same language when defining the § 3631 elements "intimidate" and "interfered with" that it had found obviously flawed in the § 241 instructions, stating that these elements have no technical meaning, are understood in their "ordinary" meaning, and "cover conduct intended ***to frighten or harass*** other persons." App 13a, 95a

C. The Undisputed Record Demonstrates a High Likelihood of Prejudice to Magleby From the Unconstitutional Instructions

As a matter of law, a defendant is entitled to instructions describing any recognized defense for which there exists sufficient evidence for a reasonable jury to find in his favor. *Matthews v. U.S.*, 485 U.S. 58, 63 (1988); *U.S. v. Migliaccio*, 34 F.3d 1517, 1523 (10th Cir., 1994). Such evidence existed here. Magleby repeatedly testified that he did not intend his expressive act to harm the Henrys, but to bolster his standing with his peers, attract media attention, and "rile" people up. Magleby did not even consider the Henrys' reactions until later, and he adamantly denied any intention to intimidate or threaten them.

But the instructions given at trial - whether taken as a whole or as parsed as the Government prefers - show that the judge never described the elements of a "true threat" required by this Court. Magleby's counsel sought

instructions that informed the jury that cross burning may be protected by the First Amendment, and that to convict him the jury had to find that he intended to threaten the Henrys with imminent physical force or violence or to cause them to reasonably fear the use of such force or violence. App 72a-75a Magleby's instructions accurately defined the *mens rea* elements required to demonstrate that his speech was outside of the First Amendment. But the judge rejected his instructions, failed to provide a substitute that explained the elements of a "true threat," and blocked Magleby's counsel from even arguing the First Amendment to the jury.

Any real scrutiny of the record shows that the likelihood of harm in this case was substantial. As is apparent from the facts recited in the Statement of the Case, Magleby put on a vigorous defense that showed that he never intended to cause the Henrys' any injury, a defense that included testimony from outside witnesses, character witnesses, and his own lengthy testimony. Even with the severely flawed instructions that were given, the case was far from a "slam dunk" prosecution. The jury deliberated late into the night, and only reached a verdict after repeatedly requesting further instructions.

In short, the Tenth Circuit's reasoning that appellate counsel was not ineffective for challenging the jury instructions because of the limited caselaw and the likelihood of harmless error is contrary to both numerous First Amendment decisions of this Court, and the undisputed record of the case in which Magleby's intent in burning the cross was his hard-fought and credible defense.

III. The Seventh Circuit's *En Banc* Decision in *United States v. Colvin* Correctly Held that the Use of Fire Enhancement in 18 U.S.C. § 844(h)(1) Cannot Be Used When 18 U.S.C. § 241 Is the Predicate Felony

Ineffectiveness of appellate counsel is further readily demonstrated with examining the merits of an issue of exceptional importance that the Court of Appeals for the Seventh Circuit, in an unanimous *en banc* decision, held to be

quite obviously incorrect as a matter of law, in that the Government is not permitted to seek a ten-year penalty enhancement for using fire in the commission of any felony, when the predicate felony is § 241, conspiracy against rights. Thus, the Seventh Circuit held as a matter of statutory interpretation, that "[b]ecause the conspiracy offense is the agreement alone, and because fire was not used in this case to form that agreement, fire could not have been used to commit the § 241 conspiracy. We therefore conclude that the § 241 offense cannot support Colvin's § 844(h)(1) conviction for using fire to commit a felony..." *United States v. Colvin*, 353 F.3d 567, 576 (7th Cir. 2003) (*en banc*).

The Tenth Circuit Court of Appeals, however, refused to state definitively whether or not 11 federal judges in the Seventh Circuit were wrong in *Colvin*, when they unanimously concluded that the use of fire has nothing to do with a conspiracy conviction that is on common law ground and does not require proof of an overt act.[9][10] *See also United States v. Shabini*, 513 U.S. 10 (1994); *United States v. Whitney*, 229 F.3d (10th Cir. 2000). This opinion in *Colvin* was also presaged ten years by the Seventh Circuit's opinion in *United States v. Hayward*, where it was unreservedly noted that

---

[9] Instead, the Tenth Circuit appears to cite *dicta* tracing back to other decisions that conspiracies continue, without examining that this ignores the fact that one does not use fire to commit a conspiracy, and there is no case law support for the *dicta* used being applicable to permit persons to receive additional ten year penalty enhancements, for not only the underlying crimes with overt acts, but also the conspiracy to commit the underlying crime.

[10] However, the effect of the Tenth Circuit's decision in this issue, would be that the Justice Department would be permitted to seek refuge in the apparent conflict created by the Tenth Circuit's decision, by continuing to seek ten-year penalty enhancements for persons charged with conspiracy offenses related to cross-burnings. There are approximately 30 cross burnings per year in the United States, of which about 40% are prosecuted by the Justice Department's civil rights division. "Cross-Burning Penalty Appealed," Washington Post, January 24, 2004, Pg. A6.

"[t]he defendants also argue for the first time on appeal that the offense of 18 U.S.C. § 844(h)(1) requires the defendant to use fire in the commission of another federal felony. *Since the federal felony of conspiracy, under 18 U.S.C. § 241, is complete at the time that the agreement is made, the use of fire in the case at bar gives no vitality to the commission of the conspiracy. The fire was not an aid in formulating the agreement.* The defendants have waived this argument because they did not present it to the district court." [Emphasis Added] *United States v. Hayward*, 6 F.2d 1241, 1249 (7th Cir. 1993).

For the case *sub judice*, trial counsel argued this same legal issue addressed in *Colvin* and *Hayward* for greater than thirty (30) pages of transcript. [Aplt App. 470-502, 613] In response to this argument the trial court stated as follows:

> THE COURT: [I]n order for me to allow you to qualify for proving someone has used fire to commit a felony, you're going to have to also require yourselves to prove that the felony included an overt act that involved the use of fire; do you see what I mean? Otherwise, I don't see how I can say that you used fire to commit that felony.
>
> ---
>
> THE COURT: How do you use fire? See, if there's any sense to this statute of Congress they're saying we want to punish people heavily and much more severely and assuredly if they're out there using fire. They use the word use, not contemplate the use of. *And so just plain common sense tells me that you haven't used fire in reaching an agreement. I can't even get my mind there on it. You don't use fire to reach an agreement, even though the agreement anticipates the use of fire.* [Emphasis added] [Aplt App. 487-488][11]

---

[11] Judge Benson voiced exasperation at the Government's refusal to drop the penalty enhancement to the conspiracy charge.

"Why do you want all this? Why do you want - I don't get the common sense of it. I don't even get the strategy of it. I think taking a step back from this, if you don't win, if you don't win on 1 and 2, I can't imagine a jury parsing or splitting a hair

Although the *Colvin* Court ultimately upheld the use of the Section 844 (h)(1) fire penalty enhancement in that case, noting that Colvin was also criminally convicted and sentenced for a penalty enhancement to the underlying Section 3631 crime of deprivation of civil rights,[12] not just the Section 241 conspiracy to commit the underlying offence, for the case *sub judice*, the only penalty enhancement applicable to Magleby was for the Section 241 conspiracy.

If the Petitioner were charged with a crime where an element of that crime was caused by the use of fire, then the Government may be permitted under the *Colvin* Court's analysis of the Section 844 statute to seek a 10-year penalty enhancement for using fire in the commission of a felony. Here, the crime that Magleby was actually convicted and sentenced for was "conspiracy against rights." [13] This was

---

here and finding one of those and not the other. I think [Count 3] complicates things, *creates an issue on appeal...*" [Emphasis added] [Aplt App 480]

[12] It should be noted, however, that the Seventh Circuit in *Colvin* approved of the applicability of § 844 (h)(1) to § 3631, by a minimal 6-5 vote, because of the dissent's concern that this application violated principles of statutory interpretation as well as double jeopardy. *Colvin*, at 579-580. This issue is not presented to this Court because Magleby was not sentenced for using fire for the underlying § 3631 offense, but only the separate § 241 conspiracy to commit the underlying offense.

[13] A conspiracy is distinct from the substantive crime contemplated by it. This Court described the social interest in separating conspiracies from their objectives,

"[F]or two or more [persons] to...combine together to commit...a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the

lefined under Section 241 and conveyed to the jury as .iaving the following three elements in order to be found guilty, which the trial judge explicitly noted to the jury *established complete proof of the crime*:

> First: That a conspiracy, agreement, or understanding existed;
>
> Second: That the defendant knowingly and intentionally became a member of the conspiracy, agreement, or understanding;
>
> Third: That the purpose of the conspiracy, agreement or understanding was willfully to oppress, threaten or intimidate Ron Henry and Robyn Henry in the free exercise or enjoyment of the right to occupy their dwelling, or home, without intimidation or interference because of race.
>
> If you find from the evidence that these three elements have been established beyond a reasonable doubt with regard to a defendant, then proof of the offense is **complete**. [Emphasis Added] App 79a

Thus, no overt acts were required for Magleby to be convicted by the jury of the predicate felony of Section 241, and fire was not used to commit a violation of Section 241. The jury was even specifically instructed that in Section 241, "The Government is not required to prove beyond a reasonable doubt that the defendant committed any overt act set forth in the Superseding Indictment...," a jury instruction which would run afoul of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), if overt acts in common law-based conspiracy prosecutions are now to be considered a basis for adding a ten year fire penalty enhancement.

Nevertheless, the Government argues that overt acts can be used for penalty enhancement purposes of a crime, despite the crime itself not having an overt act requirement. To accept the Government's position would defeat any

---

importance of punishing it when discovered." *Pinkerton v. United States*, 328 U.S. 640, 644 (1946).

distinction between conspiracies with overt act requirements and the more traditional conspiracies that are without an overt act requirement. This Court in *Shabani* precludes this interpretation:

> "We have consistently held that the common law understanding of conspiracy "does not make the doing of any act other than the act of conspiring a condition of liability.")... The disputed evidence [of requiring an overt act be alleged in the indictment] was offered not to prove overt acts *qua* overt acts, but to prove the existence of a conspiracy." *United States, v. Shabani*, 513 U.S. 10, 13-16 (1994).

Therefore, any overt acts alleged in the indictment in this case was relevant for the sole purpose of *establishing a goal of the Section 241 conspiracy*—not the crime of conspiracy itself. Since fire cannot be used to commit a conspiracy, except for those very rare times when someone "communicated across the Mississippi River by smoke signals or by hanging a lantern in a belfry," *United States v. Colvin*, 353 F.3d 569, 575-576 (7th Cir. 2003) (*en banc*) (*quoting United States v. Corona*, 108 F.3d 565, 573 (5th Cir. 1997)), Magleby did not use fire in commission of the § 241 predicate felony, and the 10 year penalty enhancement should be reversed.

Yet the Tenth Circuit's opinion in *Magleby* failed to directly address the merits of Magleby's argument, and then misstates a fundamental holding of the Tenth Circuit's jurisprudence in *United States v. Cook*, 45 F.3d 388, 392 (1995), which notes that "[w]hen a defendant alleges his appellate counsel rendered ineffective assistance by failing to raise an issue on appeal, *we examine the merits of the omitted issue.*" [Emphasis added] *Id.* at 392-393.

Virtually every legal case is unique. Just because there was no controlling authority in the Tenth Circuit on this statutory interpretation issue at the time of Magleby's appeal does not immunize counsel on direct appeal from ineffectiveness assistance claims from not competently reviewing the trial record or other circuit's caselaw. Since trial counsel objectively presented and argued at length an

obvious reversible issue, it is the failure to present this issue on appeal that should be the focal point for ineffectiveness of appellate counsel review by the courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

RESPECTFULLY SUBMITTED ON
DECEMBER 19, 2005

PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street, P.O. Box 850
Middletown, Maryland 21769
(301) 293-6822

MICHAEL WEIN
Attorney for Petitioner
7829 Belle Point Drive
Greenbelt, MD 20770
(301) 441-1151

APPENDIX

APPENDIX A - REPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED AUGUST 19, 2005

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v. No. 03-4191

MICHAEL BRAD MAGLEBY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION (D.C. NOS. 2:02-CV-00469-DB and 2:98-CR-565-DB)

Paul Victor Jorgensen, Middletown, Maryland (Michael Wein, Greenbelt, Maryland, with him on the brief) for Defendant-Appellant.

Diana Hagen, Assistant United States Attorney (Paul M. Warner, United States Attorney, with her on the brief), Salt Lake City, Utah, for Plaintiff-Appellee.

Appendix A

Before **HENRY**, **HARTZ**, and **MCCONNELL**, Circuit Judges.

HARTZ, Circuit Judge.

On the evening of September 6, 1996, Michael Brad Magleby had five friends over to his house for a barbecue. *United States v. Magleby*, 241 F.3d 1306, 1308 (10th Cir. 2001) (opinion on direct appeal). They talked about how they disliked people of other races and they listened to music and viewed web sites that expressed a similar view. *Id.* Eventually Mr. Magleby told his friends about a group from the Kingdom of Tonga that had recently moved into the neighborhood. *Id.* Mr. Magleby and his minor friend L.M. resolved to burn a cross at the Tongans' house. *Id.*

That night Mr. Magleby and L.M. built a cross, spray-painted it black, and purchased gasoline with which to douse it. *Id.* at 1309. They then proceed to the Tongans ' house. *Id.* But before Mr. Magleby could take the cross out, L. M. spotted several men outside the house. *Id.* In light of their presence, Mr. Magleby and L. M. decided that it would be unwise to carry on with the cross burning. *Id.* Instead, L.M. told Mr. Magleby about a house in which (here the evidence was disputed) either a "crackhead" or an African American lived and at which they could burn the cross. *Id.* Mr. Magleby and L.M. proceeded to burn the cross outside that house, which turned out to be the home of an interracial couple and their child. *Id.* The

Government conceded that Mr. Magleby did not know anything about the residents until L.M. told him about them that night. *Id.*

On December 10, 1999, Mr. Magleby was convicted of burning and conspiring to burn a cross outside the home of an interracial couple, in violation of 18 U.S.C. § 241 (conspiracy to violate civil rights) and 42 U.S.C. § 3631 (violation of civil rights). *Id.* His sentence was enhanced under 18 U.S.C. § 844 (h)(1) for use of fire in the commission of the § 241 conspiracy. *Id.* We affirmed the conviction on the grounds raised on appeal. *Id.* at 1320.

Mr. Magleby then filed a motion for habeas corpus relief under 28 U.S.C. § 2255 in the United States District Court for the District of Utah. The district court denied the motion. Mr. Magleby now appeals that denial, contending that (1) the jury instructions permitted convictions for constitutionally protected speech; (2) § 844 (h)(1) is unconstitutional as applied because it specially punishes symbolic speech that uses fire; and (3) a § 844 (h)(1) enhancement does not apply to a § 241 conspiracy unless fire was used in the process of agreement. None of these contentions was raised on direct appeal. But, Mr. Magleby contends that they were so obvious at the time of direct appeal that the failure to raise them constituted ineffective assistance of appellate counsel, in which case Mr. Magleby is not procedurally barred from raising them on collateral review. We exercise jurisdiction under 28 U.S.C. § 2255 and affirm.

I. Jury Instructions

Mr. Magleby contends that the jury instructions did

not convey that he could be convicted only if his cross burning constituted a threat of unlawful violence to identifiable persons, as required by the First Amendment, *see Virginia v. Black*, 538 U.S. 343, 359 (2003). Before addressing the particular instructions at issue, we must describe the underlying First Amendment law.

Free-speech protection is not limited to views tolerable to a majority. Only two years ago the Supreme Court reaffirmed that cross burning may be speech protected by the First Amendment. *See Black* , 538 U.S. at 360. But what would ordinarily be protected speech may, in context, cross the line – here, the line between political statement and threat of unlawful violence. *See id.* at 359-60. Unprotected by the Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. *Id.* at 359. The threat must be made "with the intent of placing the victim in fear of bodily harm or death." *Id.* An intent to threaten is enough; the further intent to carry out the threat is unnecessary. *Id.* at 360.

Mr. Magleby contends that the jury instructions in his case were contrary to the legal principles announced in *Black*. But he missed his best opportunity to raise this issue – namely, on his direct appeal. Ordinarily, this failure would bar a habeas corpus challenge. *See United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995). Review under § 2255 is not an alternative to appellate review for claims that could have been presented on direct appeal but were not. To overcome this procedural bar, Mr. Magleby must show cause for and prejudice from his failure to raise his jury-instruction challenge on direct appeal. *See id.*

As cause, he claims ineffective assistance of appellate counsel. *See id.; Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). Ineffective assistance of counsel exists when (1) "counsel's representation fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. The burden of proof on these elements lies with Mr. Magleby. *Id.*

To evaluate this claim, we must examine the state of the law at the time of Mr. Magleby's direct appeal – which was decided on March 7, 2001 – and the specific circumstances of this case. We conclude that Mr. Magleby did not receive ineffective assistance of appellate counsel, that he therefore fails to establish cause, and that his jury-instruction claims are therefore procedurally barred.

A. Law at the Time of Direct Appeal

Mr. Magleby now relies on *Black*. But his counsel on direct appeal can hardly be faulted for not pointing out the requirements of *Black*, which was decided two years after our decision in Mr. Magleby's appeal. To determine whether Mr. Magleby's counsel was ineffective, we must look to earlier precedent. The parties join in referring us to a line of decisions in the Eighth Circuit, which largely anticipated *Black*; we agree with them that these decisions are Mr. Magleby's best hope.

The seminal decision is *United States v. Lee*, 6 F.3d 1297,1298 (8th Cir. 1993) (en banc) (plurality op. of Gibson, J), in which the defendant burned a cross outside a mixed-

race apartment building and was convicted under § 241. The district court instructed that a threat could include "a variety of conduct intended to harm, frighten, punish, or inhibit the free action of other persons" and did not require "a threat of physical force or the intimidation of physical fear." *Lee*, 6 F. 3d at 1300 (plurality op. of Gibson, J.). The *en banc* court reversed, holding that a threat was protected by the Constitution, and therefore could not be the basis of a criminal conviction, unless it was a threat of "the use of imminent force or violence." *Id.* at 1304; *see id.* (Lay, J., concurring and dissenting); *cf. United States v. Pospisil*, 186 F.3d 1023, 1028 (8th Cir. 1999) (upholding § 241 conviction when "jury was instructed not to convict ... without a finding that the defendant acted with the intent to threaten ... the [victims] with physical force or violence" because "[t]his instruction was consistent with instructions mandated by our decisions involving prosecutions for cross burning under section 241" (internal quotation marks omitted) (citing *Lee*)).

United States v. McDermott, 29 F.3d 404,409-10 (8th Cir. 1994), applied *Lee* strictly. In that case the jury instruction at issue required that "defendants ... have acted by force or threat of force," and defined *force* as "power, violence, compulsion or restraint exerted upon or against a person or thing." *Id.* at 409. But the instruction went on: "[I]f you find beyond a reasonable doubt that the defendants burned a cross in order to threaten African-Americans, you may conclude that a threat of force was used." *Id.* This addition was fatal. The court wrote:

> [T]he Count II instructions permitted the jury to conclude that a threat of force was used if it found that McDermott "burned a

> cross in order to threaten." By wording [the] [i]nstruction ... in permissive terms, however, the court allowed the jury to convict without finding that the McDermotts burned the cross with the intent to threaten the use of force or at least cause blacks to reasonably fear the imminent use of force or violence. These instructions do not square with ...*Lee*, and constitute reversible error.

Id. at 410 (internal citations omitted). Because one could threaten action other than the use of force, burning a cross to threaten is not the same as burning a cross to threaten *the use of force*; but the instructions conveyed that the former would suffice, and so did not accurately state the law.

No reported federal appellate case contrary to the Eighth Circuit decisions had been decided at the time of Mr. Magleby's direct appeal.

B. Application of the Law to the Jury Instructions

We now examine the jury instructions in this case to determine whether the failure to challenge them on First Amendment grounds on appeal, in light of the state of the law at the time, was objectively unreasonable. Had Mr. Magleby challenged the jury instructions on direct appeal, we would have reviewed de novo whether the instructions as a whole accurately conveyed the applicable law. *See Gardetto v. Mason*, 100 F.3d 803,816-17 (10th Cir. 1996) (applying instructions-as-a-whole test in context of First Amendment challenge). An unfortunate sentence, misleading on its own, is not dispositive; in context, such a

sentence might be so clarified that the instructions as a whole nonetheless convey the law accurately. *See United States v. Platte*, 401 F. 3d 1176, 1183 (10th Cir. 2005). Applying this standard, we hold that the likelihood of success in challenging the jury instructions on First Amendment grounds on direct appeal was not so great that counsel's failure to make the challenge "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

1. Instructions on the § 3631 Charge

On the § 3631 charge, instruction 27 states:

> In order to establish the offense described by Section 3631 ... the Government must prove these five elements beyond a reasonable doubt:
>
> First: *The defendant used force or threat of force;*
>
> Second: The defendant intimidated or interfered with, or attempted to intimidate or interfere with the right of Ron Henry and Robyn Henry [the interracial couple] to occupy [their] dwelling . . .;
>
> Third: The defendant engaged in the conduct described because of the race or color of one or both Ron Henry and Robyn Henry and because one or both Ron Henry and Robyn Henry were attempting to

> occupy their home free from racial discrimination;
>
> Fourth: The defendant acted willfully;
>
> Fifth: The defendant's conduct involved the use of fire, that is erecting and setting on fire a cross.

Jury Instr. No. 27 (emphasis added), Aplt. App. at 81. Instruction 28 elaborates:

> The term "force" includes the exercise and application of physical power. In common usage force means power, violence, compulsion, or restraint exerted upon or against a person or thing.
>
> The term " threat of force" means precisely what the term implies - namely, a threat, either by words or gestures, to inflict some harm. While "force" itself requires some physical manifestation of violence, "threat of force" falls short of actual violence and ordinarily signifies the expression of one person's intention to act against another or to do some harm. As I instructed you before [in Instruction No. 22, on the § 241 charge - see below], to threaten or intimidate does not require the possibility of physical force or physical harm.
>
> ...[I]f you find that a defendant participated in burning a cross and you find the defendant intended by the cross burning to threaten or frighten the victims, then you

> may find that he used force or the threat of force. The Government need not prove that the defendant actually intended to carry out the threat.

Jury Instr. No. 28, Aplt. App. at 82.

Mr. Magleby raises two challenges to these instructions. First, after summarizing the Eighth Circuit precedents, he complains that "[t]he trial court defined 'force' to include any form of 'compulsion, or restraint exerted against a person or thing.'" Aplt. Br. At 22. But he provides absolutely no explanation why this language is troubling, except to say that it is "overbroad," apparently because it did not require the threat of physical violence or force. *Id.* The complete language of the pertinent paragraph of the instruction, however, was: "The term 'force' includes the exercise and application of physical power. In common usage force means power, violence, compulsion, or restraint exerted upon or against a person or thing." Jury Instr. No.28, Aplt. App. at 82. In the context of Mr. Magleby's trial, the flaw in this paragraph, if any, is not immediately apparent to us. The natural reading of the language in the instruction is that it is referring to physical force.

Mr. Magleby's second complaint is that "[t]he court also explained : 'As I instructed you before, to threaten or intimidate does not require the possibility of physical force or physical harm.'" Aplt. Br. at 22. Again, however, the only thing he claims to be wrong with the sentence is that it is "overbroad." *Id.* If there is a flaw, it is a subtle one. The sentence appears in a paragraph of the instructions devoted to the distinction between a *threat* of force and the actual *use*

of force. Given that the elements instruction told the jury that it must find that " [t]he defendant used force or threat of force," Aplt. App. at 81, the quoted sentence can best be understood as explaining that the Government need not prove that the threat of force could or would actually be carried out. *See Black*, 538 U.S. at 359-60 (intent to carry out the threat is unnecessary).

Reading the §3631 instructions as a whole, we do not think that the failure of Mr. Magleby's counsel on direct appeal to raise a First Amendment challenge to the instructions "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688. Perhaps an appeal on this ground would have succeeded, but counsel could also reasonably fear that the issue was more likely to distract the appellate court's attention from issues with a greater likelihood of success. Although we now know that this court rejected all the issues raised on direct appeal, those issues were not frivolous. It took a published opinion occupying 12 pages of text in the reporter to dispose of them. *See Magleby*, 241 F. 3d at 1308-20.

2. Instructions on the § 241 Charge

On the § 241 charge the district court instructed the jury:

> Section 241 ...has three elements ...;
>
> First: That a conspiracy, agreement, or understanding existed;

> Second: That the defendant knowingly and intentionally became a member of the conspiracy, agreement, or understanding;
>
> Third: That the purpose of the conspiracy, agreement or understanding was willfully to oppress, threaten or intimidate Ron Henry and Robyn Henry in the free exercise or enjoyment of the right to occupy their dwelling, or home, without intimidation or interference because of race.

Jury Instr. No. 18, Aplt. App. at 69. The district court went on:

> The words "oppress," "threaten," or "intimidate" are not used in any technical sense; they are to be understood in their ordinary meaning to cover a variety of conduct intended to threaten or frighten other persons or to prevent or punish the free action of other persons. To oppress, threaten or intimidate does not require the possibility of physical force or of physical harm.
>
> In this case, the Government has alleged that the plan and purpose of the defendant's conspiracy was to burn a cross in the Henry family's yard. If you find that there was a conspiracy whose plan was to burn a cross, and you find that the conspirators intended the cross burning to threaten, frighten or harass the victims, then

> you may find that the conspirators willfully acted "to oppress, threaten, and intimidate" within the meaning of the law.

Jury Instr. No. 22, Aplt. App. at 76.

We agree with Mr. Magleby that these instructions are flawed. They never define *threat* as requiring a threat of force; to the contrary, they assert that *oppress, threaten, and intimidate* are used in their everyday sense. Many acts short of unlawful violence may constitute oppression or intimidation in the everyday sense of these words. As Judge Richard Arnold put it:

> If, instead of burning a cross . . . the defendant had distributed leaflets . . . stating that the Klu Klux Klan was in the neighborhood, disliked black people, and wanted them to move out, the black residents . . . could well have been threatened or intimidated in the sense allowed by the District Court's instructions to the jury in this case.

United States v. Lee, 935 F2d 952, 960 (8th Cir. 1991) (R. Arnold, J., dissenting), *rev'd en banc*, 6 F.3d 1297 (8th Cir. 1993).

But it is not always objectively unreasonable for appellate counsel to forego a challenge to an improper instruction. Counsel may believe that the error is likely to be considered harmless. That likelihood is considerable here. "Any error, defect, irregularity, or variance that does

not affect substantial rights must be disregarded." Fed. R. Crim. P. 52. Even the omission in a jury instruction of an essential element of the crime is subject to harmless-error review. *See Neder v. United States*, 527 U.S. 1, 7-15 (1999).

The flaw in the § 241 instructions is that they did not require the jury to find that Mr. Magleby conspired to threaten the use of *force*. But, as previously explained, the jury's verdict on the § 3631 charge almost surely reflected a finding that Mr. Magleby's cross burning constituted a willful threat of force. Because the cross burning was the only object of the alleged § 241 conspiracy, it would be passing strange if the jury did not believe that Mr. Magleby and L.M. had conspired to threaten *force*. *Cf. Henderson v. Kibbe*, 431 U.S. 145, 156-57 (1977) (omission of instruction on element does not affect verdict when element was found under separate instruction).

An additional factor in determining whether appellate counsel was ineffective is the absence at the time of the appeal of any authority from the Supreme Court or this circuit adopting the law set forth in the Eighth Circuit cross-burning decisions. In light of all the relevant considerations presented to us, we cannot say that it was objectively unreasonable for Mr. Magleby's appellate counsel not to raise First Amendment challenges to his convictions under §§ 241 and 3631.

II. The § 844 (h)(1) Enhancement

We next turn to Mr. Magleby's contentions that (1) the § 844 (h)(1) enhancement was unconstitutional as applied to him because it specially punishes his symbolic speech and (2) the enhancement did not apply to him

because he used fire only to achieve an object of his § 241 conspiracy, not to achieve the agreement itself. Section 844 (h)(1) provides:

> Whoever –
>
> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, ... shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years.

A. First Amendment Challenge

The only difference between a § 844 (h)(1) conviction and conviction of the underlying felony is that the § 844 (h)(1) conviction requires the use of fire or an explosive. Mr. Magleby contends that the enhancement of his sentence under § 844 (h)(1) is unconstitutional as an abridgment of the freedom of speech because it specially punishes his symbolic use of fire. He relies on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In that case the statute at issue stated:

> Whoever places on public or private property a symbol, object, appellation, characteri-zation or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others *on the basis of*

> *race, color, creed, religion or gender* commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380 (emphasis added). The Minnesota Supreme Court construed the statute as reaching only "fighting words." *Id.* at 380. Nevertheless, the United States Supreme Court held that the statute was unconstitutional because it prohibited only *some* fighting words based not on their being especially offensive, but only on the point of view that they are used to express. *Id.* at 393-94.

Mr. Magleby's reliance on *R.A.V.* ignores, however, that the Supreme Court opinion made clear that a content-based distinction within a class of proscribable speech is permissible when the basis of the distinction is the same as the basis for proscribing the class of speech as a whole – for example, Congress may choose to ban only the most obscene obscenity. *Id.* at 388. Section 844 (h) (1) appears to make this type of distinction. It increases the punishment for certain felonies because they are especially pernicious. In particular, felonious threats perpetrated through the use of fire exhibit to a higher degree than other felonious threats the characteristics that make threats proscribable. Threats made using fire – which has the potential not only to frighten in a distinctly profound way but also itself to cause the threatened harm to person or property – are particularly threatening threats. Accordingly, it is highly questionable whether it is an abridgment of the freedom of speech to single out threats employing fire for special punishment. *See Black*, 538 U.S. at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning cross is a particularly virulent form of intimidation.").

In view of the doubtful success of this First Amendment challenge to § 844 (h)(1), we hold that failure to raise the challenge on direct appeal did not constitute ineffective assistance of counsel.

B. § 844(h)(1)'s Applicability to § 241 Conspiracy

Section 844(h)(1) proscribes the "use[] [of] fire or an explosive *to commit* any felony" (emphasis added). Mr. Magleby contends that the § 844(h)(1) enhancement for use of fire in commission of the § 241 conspiracy was improper because the crime of conspiracy was complete on agreement and fire was not used in achieving agreement - thus fire was not used *to commit* conspiracy.

In support of Mr. Magleby's argument, the *en banc* Seventh Circuit has held that § 844(h)(1) does not apply to a conspiracy offense that does not require an overt act unless fire was used in the process of agreement, because the conspiracy is complete - and thus "committed" - once the agreement is achieved. *See United States v. Colvin*, 353 F.3d 569, 575-76 (7th Cir. 2003) (en banc). We are not sure that we would embrace *Colvin*. Conspiracy is often described as a *continuing* offense, encompassing the acts performed in furtherance of the agreement. For example, venue is proper wherever acts in furtherance of the conspiracy occur, regardless of whether an overt act must be proved. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150,224 n.59, 252 (1940); *United States v. Miller*, 111 F.3d 747, 753 n.8 (10th Cir. 1997). Similarly, under Fed. R. Evid. § 801(d)(2)(E), which provides that a coconspirator's statement "during the course and in *furtherance* of the conspiracy" is not hearsay, the statement need not further

the *attainment* of an agreement; it is enough that it further an *object* of the agreement. *See United States v. Mabry*, 809 F.2d 671, 683-684 (10th Cir. 1987) *overruled on other grounds by Matthews v. United States*, 485 U.S. 58 (1988). And for statute-of-limitations purposes, a non-overt-act conspiracy is not committed simply on the date the agreement is made but "is deemed to continue as long as its purposes have neither been abandoned nor accomplished, and no affirmative showing has been made that it has terminated." *United States v. Arnold*, 117 F.3d 1308, 1313 (11th Cir. 1997). Here, the jury was instructed that to convict it must find that "[t]he defendant intentionally used fire in the commission and furtherance of the Count I conspiracy" and that "[t]he Count I conspiracy was in existence at the time defendant used fire. . . and the defendant was a member of the conspiracy at that time." Aplt.'s App. at 88.

In any event, we need not resolve this issue today. Mr. Magleby is barred from raising it in this habeas proceeding because he did not raise it on direct appeal. *See Cook*, 45 F.3d at 392. He could escape this procedural bar only by showing cause for his failure to do so. *See id.* His sole argument in this regard is that his appellate counsel was ineffective. We are not persuaded.

Whatever the merits of Mr. Magleby's § 844(h)(1) contention, it was not so obvious at the time of his direct appeal that counsel's failure to raise it was unreasonable. No decisions had yet adopted his view. At the time of the appeal – which was decided on March 7, 2001 – even the Seventh Circuit applied § 844(h)(1) to non-overt-act § 241 conspiracies. *See United States v. Hartbarger*, 148 F.3d 777, 785-86 (7th Cir. 1998) ("We hold that the district court properly concluded that 18 U.S.C. § 844(h)(1)'s sentencing

enhancement for using fire to commit any federal felony applies to cross burnings in violation of 18 U.S.C. § 241.") *But cf. United States v. Lee*, 935 F.2d at 958 (legislative history shows that § 844(h)(1) use-of-fire enhancement is applicable only to arson).

Mr. Magleby nonetheless argues that it was unreasonable not to raise this contention on appeal because the district judge had pointed it out at trial. But Mr. Magleby misreads the transcript. The district judge, in a colloquy with government counsel, did express doubt about the applicability of § 844(h)(1). Later, however, the district judge concluded that conspiracy was a continuing offense and that § 844(h)(1) would apply if the jury found beyond a reasonable doubt that the use of fire was in furtherance of the conspiracy. This conclusion did not turn on the incorrect belief that § 241 requires an overt act: the district judge expressly recognized that § 241 does not require an overt act.

Consequently we hold that failing to raise the inapplicability-of-§ 844(h)(1) contention on direct appeal was not ineffective assistance of counsel and that we therefore cannot reach this contention on collateral review.

III. CONCLUSION

We AFFIRM the district court's denial of the § 2255 motion.

Appendix A

APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FORTHE TENTH CIRCUIT FILED SEPTEMBER 20, 2005

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v. No. 03-4191

MICHAEL BRAD MAGLEBY

Defendant-Appellant

ORDER
Filed September 20, 2005

Before **HENRY**, **HARTZ**, and **MCCONNELL**, Circuit Judges.

Appellant's petition for rehearing is denied.

Appendix A

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
CLERK, COURT OF APPEALS

By: K Fabrizio
Deputy Clerk

APPENDIX B - REPORTED MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH -CENTRAL DIVISION FILED JULY 8, 2003

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL BRAD MAGLEBY,

Defendant.

MEMORANDUM OPINION AND ORDER
2:02cv469DB
Case No. 2:98CR565

Before the Court is petitioner's motion to vacate, set aside, or correct sentence by a person in federal custody pursuant to 28 U.S.C. § 2255. Having listened to the parties' oral arguments and reviewed the parties' briefs as well as the applicable law, the Court issues the following memorandum opinion and order.

I. PROCEDURAL HISTORY

Petitioner's convictions stem from his conduct on September 6, 1996. That evening, petitioner and a fifteen-year-old accomplice built a wooden cross at petitioner's home and transported it to the home of Ron and Robyn Henry, an interracial couple. Then, under the cover of darkness in the early morning hours of September 7, peti-

tioner and his accomplice removed the cross from their vehicle, stood it in the Henry's yard, doused it with gasoline and set it on fire.

Petitioner was indicted on five counts. Count 1 charged petitioner with violating 18 U.S.C. § 241. Section 241 prohibits "two or more persons [from conspiring] to injure, oppress, threaten, or intimidate any person ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Count 2 charged petitioner with violating 42 U.S.C. § 3631(a). Section 3631(a) states that "[w]hosoever ... by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with any person because of his race, color, religion, sex, handicap, familial status, or national origin and because he or she has been ... occupying ... any dwelling" shall be guilty of crime against the United States.

In count 3 petitioner was indicted for using "fire or an explosive to commit [a] felony which may be prosecuted in a court of the United States" in violation of 18 U.S.C. § 844(h)(1). The felony contemplated in count 3 was the conspiracy described in count 1. Count 4 also charged petitioner with violating 18 U.S.C. § 844(h)(1). [1] Finally, in count 5, petitioner was charged with witness tampering in violation of 18 U.S.C. § 1512(b)(3). [2]

---

[1] This count was dismissed after the trial but before petitioner's sentencing.

[2] Petitioner does not contest his conviction under this count.

Appendix B

After a six day trial, the jury returned a verdict of guilty on all counts. On December 20, 1999 petitioner was sentenced to 144 months imprisonment to be followed by 36 months supervised release. Petitioner then appealed his conviction. [3] On March 7, 2001 the Tenth Circuit Court of Appeals rejected petitioner's arguments and affirmed petitioner's convictions. *United States v. Magleby*, 241 F. 3d 1306 (10th Cir. 2001). Petitioner then filed this motion with the Court.

---

[3] On appeal, petitioner presented several evidentiary issues for review. He alleged that (1) there was insufficient evidence to support his convictions under Counts I, II, III, (2) the Court improperly instructed the jury that they could convict under Counts II and III if they found petitioner's conduct was solely motivated by the race of the victims, without regard to whether he was motivated by the victims' occupation of their dwelling, (3) there was insufficient evidence that he acted with the specific intent to interfere with the victim' housing rights, (4) the jury was improperly instructed that petitioner's intent could be inferred from the victim's reaction to his conduct; and (5) the Court improperly admitted evidence including (a) testimony of an expert witness regarding the Klu Klux Klan, when there was no evidence that petitioner was ever involved with that group, (b) hearsay testimony regarding a notorious racist and his extreme views, (c) evidence that petitioner gave alcohol to minors, (d) evidence regarding the victims' reactions to the petitioner's conduct, (e) evidence that the victims' son slept with a baseball bat at night after the incident, and (f) lyrics to racist songs.

Appendix B

Petitioner argues that his convictions should be vacated and that his sentence should be set aside based on five reasons. First, petitioner claims that he was prosecuted for expressive conduct (cross burning) in a manner inconsistent with the First Amendment because the jury instructions allowed him to be convicted based on the content of his speech. Second, petitioner claims that an enhanced sentence for the use of fire when applied to cross burning violates the First Amendment's right to free speech. Third, he argues that the enhanced sentence for using fire in connection with other felonies was impermissible as applied to his case. Fourth, petitioner asserts that his conviction for using fire to commit a conspiracy is improper since, as he asserts, fire was not employed in the conspiracy itself, but rather in the final object of the conspiracy. Finally, petitioner argues that he received ineffective assistance of counsel due to his attorney's failure to raise on appeal the issues comprised in grounds one, two, and three. The Court will first evaluate petitioner's claim of ineffective assistance of counsel.

III. DISCUSSION

A. Ineffective Assistance of Counsel

It is well settled that failure to raise issues on direct appeal procedurally bars a defendant from raising those same issues on a § 2255 motion.[4] *See United States v. Warner,*

---

[4] A procedural bar remains "regardless of whether the movant made a contemporaneous objection to the alleged error at trial." *Hines v. United States*, 971 F.2d 506, 508 (10th

23 F. 3d 287, 291 (10th Cir. 1994) (Section 2255 motions are not available to test the legality of matters which should have been raised on direct appeal); *United States v. Cox*, 83 F. 3d 336 (10th Cir. 1996). Petitioner admits that the issues within this motion were not raised on appeal. Therefore, petitioner's claims are procedurally barred by his failure to raise them on direct appeal. However, petitioner argues that this procedural defect should be excused because he received ineffective assistance of counsel on appeal.

If an issue is not raised on direct appeal, the defendant "is barred from raising the issue in a § 2255 proceeding, unless he establishes either cause excusing the procedural default and prejudice resulting from the error or a fundamental miscarriage of justice if the claim is not considered." *Id.* at 341. Cause and prejudice for failing to raise issues on appeal may be established by showing that the defendant received ineffective assistance of counsel. *United States v. Cook*, 45 F.3d 388,392 (10th Cir. 1995) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

To show ineffective assistance of appellate counsel, a defendant must prove that "his counsel's performance was constitutionally deficient, and that this deficient performance prejudiced him." *United States v. Harfst*, 168 F.3d 398, 402 (10th Cir. 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).[5] To satisfy the first prong of this

---

Cir. 1992), *United States v. Khan*, 835 F. 2d 749 (10th Cir. 1987).

[5] Although *Strickland* established the standards for ineffective assistance of trial counsel, the 10th Circuit has applied those same standards to determine the

test, a defendant must show that his "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Then, a defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* In making a claim of ineffective assistance of counsel, a §2255 petitioner must overcome a strong presumption that counsel provided effective assistance. *Id.* at 689-90 (stating that "[j]udicial scrutiny of counsel's performance must be highly deferential"); *United States v. Kennedy*, 225 F. 3d 1187, 1197 (10th Cir. 2000).

In his motion, petitioner argues that his attorney was ineffective for failing to raise the following four arguments. First, petitioner contends that his convictions under 18 U.S.C. § 241 and 42 U.S.C. § 3631(a) were based on a speech protected by the First Amendment. Second, he argues that 18 U.S.C. § 844(h)(1) does not apply to all felonies. Third, petitioner contends that the application of § 844(h)(1) to the act of cross-burning violates the First Amendment guarantee of freedom of speech. Finally, petitioner argues that 18 U.S.C. § 844(h)(1) was impermissibly applied to this case because the conspiracy entered into by defendant was completed before he used fire in connection with any felony. The Court must examine the merits of petitioner's claims to determine if the outcome would have been different had these issues been

---

effectiveness of appellate counsel as well. See, e.g., *United States v. Dixon*, 1 F.3d 1080, 1083 (10th Cir. 1993); *United States v. Walling*, 982 F.2d 447, 449 (10th Cir. 1992).

raised on appeal. If the Court finds that "the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." *United States v. Cook*, 45 F. 3d at 394 (internal quotations omitted).

B. Convictions Under 18 U.S.C. § 241 and 42 U.S.C. § 3631

Petitioner argues first that his convictions pursuant to 18 U.S.C. § 241 and 42 U.S.C. § 3631 violate the First Amendment. Specifically, petitioner claims that the jury instructions relating to these statutes permitted petitioner to be convicted for constitutionally protected speech. [6] The Supreme Court recently addressed the issue of whether cross-burning could lawfully be prohibited without violating the First Amendment. *Virginia v. Black*, 123 S. Ct. 1536 (2003).

In *Black*, the Court examined a Virginia state statute that banned cross-burning with the intent to intimidate. After first examining the history and practice of cross-burning, the Court then turned to the constitutionality of

---

[6] Petitioner does not challenge these statutes on their face. However, it is worth noting that every circuit court that has addressed the constitutionality of §§ 241 and 3631 has found them to be facially valid. *See United States v. J.H.H..*, 22 F. 3d 821 (8th Cir. 1994) (§§ 241 and 3631); *United States v. Hayward*, 6 F. 3d 1241 (7th Cir. 1993) (§ 3631); *United States v. Stewart*, 65 F. 3d 918 (11th Cir. 1995) (§ 3631); *United States v. Gilbert*, 813 F. 2d 1523 (9th Cir. 1987) (§ 3631).

the Virginia statute. Ultimately, the Court found it to be consistent with the First Amendment of the Constitution. Its reasoning is very instructive to this case.

The Court first reiterated the long-standing rule that the First Amendment permits the proscription of speech that constitutes a "true threat". *Id.* at 1547 (quoting *Watts v. United States*, 394 U.S. 705,708 (1969) (*per curiam*) (internal quotation marks omitted). Then extrapolating on the definition of a "true threat," the Court held that such an exception includes speech that "communicates a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.: *Id.* at 1548. However, the Court held that the

> speaker need not actually intend to carry out the threat. Rather a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. Because the burning of a cross is a "symbol of hate," *Capital Square Review and Advisory Bd. V. Pinette*, 515 U.S. 753,771 (THOMAS, J., concurring), such an act may and often does meet the definition of a "true threat." *Black* at 1546. Accordingly, "a ban on cross burning carried out

with the intent to intimidate ... is proscribable under the First Amendment." *Black* at 1550.

In the case before the Court, the jury was instructed that the indictment charged that petitioner "did willfully conspire and agree to oppress, threaten and intimidate" the victims "in the free exercise and enjoyment of ... the right enjoyed by all citizens of the United States to purchase lease and occupy real property without injury, intimidation or interferences because of their race or color," in violation of 18 U.S.C. § 241. Jury Instruction No. 17. In Jury Instruction No. 22, the Court then defined "oppress, threaten and intimidate" as follows:

> The words "oppress," "threaten," or "intimidate" are not used in any technical sense; they are to be understood in their ordinary meaning to cover a variety of conduct intended to threaten or frighten other persons or to prevent or punish the free action of other persons. To oppress, threaten or intimidate does not require the possibility of physical force or of physical harm.

Petitioner makes three challenges to this jury instruction. First, petitioner argues that this instruction gives an impermissibly broad definition of the words "oppress, threaten and intimidate" found in 18 U.S.C. § 241. Petitioner relies heavily on *U.S. v. Lee*, 6 F. 3d 1297 (8th Cir. 1993), in support of his argument.

In *Lee*, defendant and some friends burned a cross on a small hill about 400 feet from the apartment complex

where his girlfriend and approximately fifteen black families lived. The testimony showed that defendant's intent in burning the cross was to do something about the racial problems in the area, "including several assaults which had occurred among the children in the complex." *Id.* at 1298. After hearing the testimony at trial, the court then submitted the following jury instruction to the jury. It stated:

> [T]he words threaten or intimidate, are not used in any technical sense, but they cover a variety of conduct intended to harm, frighten, punish, or inhibit the free action of other persons.
> To threaten or intimidate does not require a threat of physical force or the intimidation of physical fear.
>
> . . . . .
>
> In order to constitute a criminal conspiracy under Count I (section 241), the defendant's actions must have been taken with the specific intent to intimidate or interfere with the residents [sic] right to occupy a dwelling free of force or threats of force.

Id. at 1299

On appeal, the Eighth Circuit Court of Appeals reversed the defendant's conviction under § 241. The Eighth Circuit held that while § 241 is facially valid, the jury instructions must limit the scope of the speech to unprotected expression, such as speech inciting imminent lawless action or threats of violence. *Id.* at 1302. Such an

instruction would permit a jury to find the defendant guilty only if his "actions were done with the intent to advocate the use of force or violence and were likely to produce such action; or that Lee intended to threaten the residents ... or at least intended to cause the residents of the ... apartments to reasonably fear the use of imminent force or violence." *Id.* at 1304. However, the court found that this jury instruction permitted defendant to be convicted for speech that did not constitute a true threat.

Neither this nor any other circuit has accepted or rejected the holding of *Lee*. However, even if *Lee* were binding authority on this case, the jury instructions in the case before this Court did not violate the principles expressed in that case. Instead, consistent with the definitions set out by the Eighth Circuit Court in *Lee* and, more importantly the holding of the Supreme Court in *Virginia v. Black*, 123 S. Ct. 1536 (2003), the jury instructions in petitioner's trial limited the scope of § 241 and § 3631 to conduct amounting to threats and intimidation which are outside the scope of protected speech contemplated by the First Amendment.

This is true because the jury instruction in *Lee* permitted the jury to convict the defendant if it found that is speech merely "inhibit[ed] the free action of other persons." That instruction was improper because it did not require the jury to find "a threat of physical force or the intimidation of physical fear." *Lee*, 6 F. 3d at 1300. However, Jury Instruction No. 22, in this case, did not contain that language. Instead, this Court instructed the jury that they could find the statute to have been met if they found petitioner had intended to "threaten or frighten other persons or to prevent or punish the free action of other

persons." The use of the word "prevent" instead of "inhibit" makes this instruction proper; subsequent to *Lee* the Eighth Circuit upheld a instruction that incorporated this distinction because it "denotes a more forceful and threatening course of conduct that merely making someone hesitate before acting in a certain way." *See United States v. Mc.Dermott*, 29 F. 3d 404, 408-9 (8th Cir. 1994) (holding that an instruction defining "oppress, threaten or intimidate" to include "conduct intended to harm, frighten, punish or prevent the free action of other persons," satisfied the requirements of *Lee*).

Next, petitioner challenges the language in Jury Instruction No. 22 that states, "[t]o oppress, threaten or intimidate does not require the *possibility* of physical force or of physical harm." (emphasis added). Petitioner argues that this language is also improper and again relies on *Lee* to support his argument; a similar jury instruction in *Lee* stated, "[t]o threaten or intimidate does not require a *threat* of physical force or the intimidation of physical fear." (emphasis added). The *Lee* court held that this instruction was inappropriate because it limited the statute to threats and intimidation only.

However, the Supreme Court's opinion in *Virginia v. Black* , 123 S. Ct. 1536 (2003), specifically approves of the instruction in this case. The Supreme Court held that the "speaker need not actually intend to carry out the threat. Rather a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the *possibility* that the threatened violence will occur."' *Black*, at 1548 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380(1992)) (emphasis added), *see U.S. v. Viefaus*, 168 F. 3d

392 (10th Cir. 1999) (explaining that "[i]t is not necessary to show that defendant ... had the ability to carry out the threat," rather "the question is whether those who hear or read the threat reasonably consider that an actual threat has been made"). Because the jury instruction merely explained that the statute protects individuals from "the fear of violence" and the "disruption that fear engenders" regardless of the "possibility that the threatened violence will occur," it was not erroneous. Indeed, *Black* explicitly stated that it is not necessary that petitioner could have actually carried out the threatened violence. Therefore, that instruction correctly defined the parameters of a "true threat." Petitioner's second challenge, therefore, also fails.

Lastly, petitioner challenges the jury instructions on the basis that they allowed the jury to convict petitioner under § 241 if he "intended the cross burning to threaten, frighten or harass the victims." Petitioner argues that this definition is too broad and encompasses protected speech.

A detailed examination of this phrase shows that petitioner can only seriously contest the use of the word "harass." The word "threaten" comes directly from § 241; the use of the word "frighten" is sanctioned both implicitly by *Black* (a true threat "protects individuals from the fear of violence") and explicitly by *United States v. McDermott*, 29 F. 3d 404, 408-9 (8th Cir. 1994). And, reading the jury instructions in their totality, the Court finds that there is no danger that the jury would believe, based on the word "harassed" that petitioner could be convicted because his conduct caused "hurt feelings, offense or resentment." *R.A.V. v. City of St. Paul*, 505 U.S. at 390.

Appendix B

Jury instructions must be viewed, "as a whole to determine whether the instructions adequately state the law and provide the jury with an ample understanding of the issues and controlling principles of law." *United States v. Dashney*, 117 F. 3d 1197, 1201 (10th Cir. 1997). In this case, the instructions as a whole properly advised the jury that petitioner could only be convicted if he engaged in unprotected conduct that amounted to threats and intimidation.

For example, Jury Instruction No. 17 states that the Jury must find that petitioner did "willfully conspired and agree to oppress, threaten and intimidate" the victims. And, Instruction No. 22 defines "oppress, threaten, or intimidate" as "conduct intended to threaten or frighten other persons or to prevent or punish the free action of other persons." *See United States v. McDermott*, 29 F. 3d 404, 408-9 (8th Cir. 1994). When read as a whole, the jury instructions properly advised the jury that only unprotected conduct, not constitutionally protected expression, could form the basis for a conviction.

This is especially true when viewed in relation to the facts in this case. Petitioner did not burn a cross in front of an apartment complex as did defendant in *Lee*. Instead, petitioner placed his burning cross in front of a single family residence. Petitioner had an audience of one family. Therefore, his conduct can more easily be brought into the realm of unprotected speech because his intent was more clear. If petitioner had wanted to express his racial bias, one would reasonably think he would have chosen a more public way to display his convictions. But his conduct was directed at one particular family. Therefore, it is easy to see

that his intent was to intimidate or threaten these particular people, not to express his particular views.

This point is further made by the placement of the respective crosses in both *Lee* and petitioner's case. In *Lee*, the cross was placed, according to the Eighth Circuit, 386 feet from the apartment complex on the top of the hill. Lee's actions, therefore, constituted a public display that was intended to inform all who would see of the racial animosity he possessed. On the contrary, petitioner's cross was meant for specific eyes; he placed his burning cross in the Henry's yard. His conduct was meant to intimidate or threaten the Henrys, not the entire community. That specific intent is sufficient to bring his conduct outside the full protection of the First Amendment. This point is brought out by the concurring opinion in *Lee* when Judge Lay remarked that "[t]he evidence shows that *Lee*'s conduct in burning the cross was not directed to inciting imminent lawless action. *Lee* placed the cross *not in front of a particular family's apartment window*, but in a field some 386 feet from the apartment buildings." *Lee*, 6 F. 3d at 1306 (Judge LAY concurring and dissenting). Evidently, the case would have come out differently if the conduct had been directed to one specific family, which is precisely the situation we have here. [7]

---

[7] *See United States v. Colvin*, 276 F. 3d 945 (7th Cir. 2002) for a case with essentially identical facts and convictions as those presented in this case. The appeal only dealt with whether an enhancement for the use of fire violated the double jeopardy clause of the Constitution and this double jeopardy holding has since been vacated and granted

The Court therefore, finds that the jury instructions were adequate to ensure that he was convicted only for conduct that is unprotected by the Constitution – a threat of physical harm with the intent to advocate force; or at least that he intended to cause the Henry's to reasonably fear the use of imminent force. Therefore, the jury instructions were not over broad and his convictions under §§241 and 3631 did not violate his First Amendment right to free speech.

C. Conviction Under 18 U.S.C § 844(h)(1)

1. Violation of First Amendment

Petitioner also argues that his conviction under count III (using fire in the commission of a federal felony) was contrary to the First Amendment. Specifically, petitioner claims 18 U.S.C. § 844(h)(1) – which requires a ten year minimum sentence for the use of fire in the commission of a federal felony – is unconstitutional when applied to cross-burning because it constitutes a content-based punishment of a mode of expression by punishing threats made through the use of fire more severely than other threats. However, the application of § 844(h)(1) to cross-burning cases does not violate the First Amendment because the enhancement for the use of fire is unrelated to the conduct's expressive content.

Fires are inherently uncontrollable and dangerous, even when used for valid reasons. *See United States v.*

---

rehearing en banc. *United States v. Colvin*, 301 F. 3d 736 (7th Cir. 2002).

Colvin, 276 F 3d 945, 949 (7th Cir. 2002). However, when coupled with criminal actions, fire takes on an even more destructive potential. "[C]ross-burnings, in particular, are dangerous [because they] have the serious potential to cause significant property damage, even when not so intended.". *Id.* Thus, when such threats to the safety of others are accompanied by the intimidating use of fire, Congress has reasonably determined that these threats should be punished more severely. Therefore, because the use of fire poses a significant danger unrelated to the message it might seek to convey, § 844(h)(1) was not unconstitutionally applied to petitioner's case.

2. Does Not Apply to All Federal Felonies.

Petitioner also asserts the blanket proposition that 18 U.S.C. § 844(h)(1) cannot be applied to all federal felonies. He relies on the Eighth Circuit's initial decision in *United States v. Lee*, 935 F. 2d 952, 958 (8th Cir. 1991), *vacated in part on other grounds en banc*, 6 F. 3d 1297 (8th Cir. 1993) to argue that Congress did not intend § 844(h)(1) to apply to cross-burning, but rather only to arson cases.

18 U.S.C. § 844(h) states in pertinent part:

> Whoever uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or carries an explosive during the commission of any felony which may be prosecuted in a court of the United States ... shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years.

Appendix B

The Eighth Circuit relied almost exclusively on the legislative history of the statute to come to this conclusion. However, two other circuits have explicitly held that the Eighth Circuit erred in *Lee*. *See United States v. Wildes*, 120 F. 3d 468,470-71 (4th Cir. 1997); *United States v. Hayward* , 6 F. 3d 1241,1248 (7th Cir. 1993). Both these circuits base their holdings on the plain, unambiguous language of the statute; § 844(h)(1) prohibits the use of fire to commit "*any* felony that may be prosecuted by the United States," not just arson cases. 18 U.S.C. § 844(h)(1). Both the Fourth and the Seventh Circuits correctly ruled that the plain language of a statute governs when it is unambiguous. *See Dept. of Housing and Urban Development*, 535 U.S. 125, 132 (2002) (reference to legislative history is inappropriate when the text of the statute is unambiguous); *Ardestini v. INS*, 502 U.S. 129, 135 (1991) (courts may deviate from the plain language of the statute only in rare and exceptional circumstances); *United States v. Albertini*, 472 U.S. 675, 680 (1985) (only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from the plain language.)

The Court agrees. Because the statute is unambiguous, the Court must interpret the statute to mean what it says. Therefore, § 844 (h)(1) applies to any federal felony. And, because petitioner was convicted of a felony § 844(h)(1) was properly applied to this case.

3. Use of Fire in the Commission of a Conspiracy

Finally, petitioner argues that his conviction under 18 U.S.C. § 844(h)(1) was improper because he did not use fire to commit a conspiracy, but rather only in the final

objective of that conspiracy - burning the cross. Therefore, he argues that the cross-burning was not part of his conspiracy and consequently that he did not employ fire in the conspiracy itself. However, conspiracy is an ongoing offense that " continues as long as the conspirators engage in overt acts in furtherance of their plot." *Toussie v. United States*, 397 U.S. 112, 122 (1970). In this case, one of the overt acts performed by petitioner was the placing of the burning cross in the Henry's yard. Therefore, petitioner's act of burning a cross was part of his conspiracy to burn a cross, and he was therefore properly convicted of using fire in the commission of a conspiracy.

D. Ineffective Assistance of Counsel

As determined above, because the substantive merits of petitioner's claims have no merit, his appellate counsel was not constitutionally ineffective. His counsel's actions did not fall below an objective of reasonableness, and petitioner was not prejudiced by his counsel's failure to raise these issues on appeal. Therefore, this ground for relief is also unpersuasive.

IV. CONCLUSION

Under the circumstances of his conduct, the jury instructions at petitioner's trial were valid to ensure that he was only convicted of threats constitutionally unprotected threats. Further, his sentence was properly enhanced by § 844(h)(1) because his conviction was not based on the content of his speech, and § 844(h)(1) applies to all federal felonies. Finally, burning the cross was an overt act in furtherance of petitioner's conspiracy. Therefore, petitioner cannot demonstrate through "a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As a result petitioner has not overcome the strong presumption that counsel provided effective assistance, and his motion is denied. IT IS SO ORDERED.

DATED this 8 th day of July 2003

Dee Benson
United States District Judge

APPENDIX C - U.S. v. MAGLEBY, 241 F.3d 1306 (10th Cir. 2001)

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

Michael Brad MAGLEBY,
Defendant - Appellant.
No. 99 - 4245.

United States Court of Appeals,
Tenth Circuit

March 7, 2001.

Following jury trial before the United States District Court for the District of Utah, Dee V. Benson, J., defendant was convicted of civil rights violation, civil rights conspiracy, using fire or an explosive in the commission of a felony, and tampering with a witness. Defendant appealed. The Court of Appeals, Tacha, Chief Judge, held that: (1) jury instructions did not involve plain error; (2) evidence was sufficient to support civil rights, civil rights conspiracy, and use of fire in commission of felony convictions; (3) evidence of victims' continuing reactions to cross burning was relevant; (4) admission of expert testimony about Klu Klux Klan was not plain error; (5) any error in admitting evidence about alleged third party racist was harmless; and (6) probative value of lyrics to racist song outweighed its prejudicial effect.

Affirmed.

Bel-Ami J. de Montreux, Montreux Freres, P.C., Salt Lake City, UT, appearing for Defendant - Appellant

Lisa J. Stark, Attorney (Jessica Dunsay Silver and Louis E. Peraertz, Attorneys, on the brief), United States Department of Justice, Civil Rights Division, Washington, DC, appearing for Plaintiff - Appellee.

Before TACHA, Chief Judge, McKAY, and HENRY, Circuit Judges.

TACHA, Chief Judge.

Defendant Michael Brad Magleby was convicted of four counts of an indictment stemming from the burning of a cross on the property of an interracial family. On appeal, Mr. Magleby argues that the evidence of his guilt regarding three of these four counts was insufficient to support his conviction. He also argues that the district court submitted two erroneous instructions to the jury. Finally, he argues that the district court erred by admitting evidence which he argues was highly prejudicial and of little or no probative value. We exercise jurisdiction pursuant to 28 U.S.C § 1291 and affirm.

I. Background

On the evening of September 6, 1996, the defendant, Michael Brad Magleby, hosted a barbecue at his home. His

friends Andy Whitlock, Steve Meguerditehian, Justin Merriam, Mr. Merriam's date Liz Cannon, and fifteen-year-old L.M. were in attendance. During the course of the barbecue, Mr. Magleby and his guests drank heavily. In addition to drinking that evening, Mr. Magleby took prescription pain pills. On this ocassion, as on other occasions, Mr. Magleby joined his friends in expressing prejudicial views of African-Americans. They told racist jokes, used racial slurs, and listened to racist CDs. The group accessed internet sites with racist jokes and other internet hate sites on Mr. Magleby's computer.

At some point during the evening, Mr. Magleby began talking about some Tongans, alleged gang members, who lived in his neighborhood. He later testified that he did not like having Tongans in his neighborhood. L.M. also testified that the Tongans had previously assaulted Mr. Magleby. During the course of his conversation, Mr. Magleby and L.M. began talking about burning a cross at the Tongans' house. Mr. Merriam taunted Mr. Magleby, telling him that he did not dare burn a cross there. Mr. Merriam told Mr. Magleby by that if he were really going to do it, he should stop talking about it and just do it.

At about 1:00 AM, after several hours of drinking, Mr. Magleby and L.M. gathered wood from Mr. Magleby's garage to build a cross. In his kitchen, Mr. Magleby used a power drill to drill holes in the wood and fastened the pieces of wood together with screws. He then applied black spray-paint to make the cross more flammable. After the cross was ready, Mr. Magleby and L.M. carried it to Mr. Magleby's jeep and drove off with Mr. Magleby behind the wheel. They stopped at a gas station to fill a beer bottle with gasoline which they planned to pour over the cross to

ensure that it would burn. They then set out for the Tongans' house.

When they arrived at the Tongans' house at about 2:30 AM, Mr. Magleby got out of his jeep and started taking the cross out. Before he took the cross out of the jeep, L.M. noticed several men outside. Because there were men outside the house, Mr. Magleby decided that "it wouldn't be too wise" to burn the cross at that house. Tr. At 800. He got back in the jeep.

At that point, Mr. Magleby told L.M. that they still had to the burn the cross because their friends would ridicule them if they did not. The parties dispute what happened next. Mr. Magleby argues that L.M. told him that he knew where a "crackhead" lived and that they could burn the cross at his house. The government argues that L.M. told him that he knew where a black man lived and that they could burn the cross there. The parties agree that Mr. Magleby knew nothing about the Henrys prior to that moment. Mr. Magleby and L.M. then drove to the house where Ron and Robyn Henry and their eleven-year-old son lived. The Henrys are an interracial family: Ron is African-American and Robyn is white.

When Mr. Magleby and L.M. arrived at the Henrys' home, Mr. Magleby took the cross out of the jeep, placed it in the Henrys' yard, poured gasoline on it, and then ignited it. The two immediately returned to Mr. Magleby's house.

After returning to Mr. Magleby's house, Mr. Magleby was excited and bragged to his friends about what he had done. Mr. Merriam became angry when he learned

where Mr. Magleby and L.M. had burned the cross because the Henrys lived in his neighborhood and his father knew them. Mr. Magleby argues that it was at this point that he first discovered that Ron Henry was African-American.

Mr. Magleby was arrested and indicted on charges stemming from burning the cross at the Henry's home. On December 10, 1999, Mr. Magleby was convicted by a Jury of conspiracy against rights in violation of 18 U.S.C. § 241, violation of civil rights and aiding and abetting in violation of 42 U.S.C. § 3631(a), using fire or an explosive in the commission of a felony in violation of 18 U.S.C. § 844(h)(1), and tampering with a witness in violation of 18 U.S.C. § 1512(b)(3).

II. Discussion

Mr. Magleby argues that the district court submitted two erroneous instructions to the jury. He also argues that the district court erred in denying his motion for judgment of acquittal because the evidence was insufficient to support his convictions under 18 U.S.C. § 241, 18 U.S.C. § 844(h)(1) , and 42 U.S.C. § 3631(a). Finally, he argues that the district court erred in admitting several pieces of evidence which, he argues, were highly prejudicial and of little or no probative value.

A. Sufficiency of the Jury Instructions

Mr. Magleby argues that the district court erred in submitting two instructions to the jury. Because Mr. Magleby did not object to either instruction at trial, we

review these instructions for plain error. *United States v. Fabiano*, 169 F. 3d 1299, 1302-03 (10th Cir. 1999).[1] In reviewing jury instructions for error, we review the instructions "as a whole to determine whether the jury may have been misled, upholding the judgment in absence of substantial doubt that the jury was fairly guided." *Id.* at 1303 (internal quotation marks omitted).

1. Jury Instruction No. 30

Mr. Magleby argues that the district court erred in submitting Jury Instruction No. 30 to the jury because it misstates the relevant legal standard of 42 U.S.C. § 3631(a). "To establish a violation of 42 U.S.C. § 3631(a), the Government must prove beyond a reasonable doubt that the defendant acted with the specific intent to injure, intimidate or interfere with the victim[s] because of [their] race and because of the victim[s'] occupation of [their] home." *United States v. Whitney*, 229 F. 3d 1296, 1303 (10th Cir. 2000) (internal quotation marks omitted).

---

[1] Mr. Magleby did not object to either Jury Instruction No. 30 or Jury Instruction No. 22. He asserts, however, that proposing an alternative to Jury Instruction No. 30 should be considered an objection to that instruction. This court has previously held, however, that proposing an alternate jury instruction is not an objection that "put the district court clearly on notice as to the asserted inadequacy of the jury instruction." *Fabiano*, 169 F.3d at 1303 (10th Cir. 1999) (internal quotation marks omitted). We therefore review both jury instructions for plain error.

Appendix C

Mr. Magleby concedes that Jury Instruction No. 27 correctly states the third element of a § 3631(a) violation: "[t]he defendant engaged in conduct described because of the race or color of one or both Ron Henry or Robyn Henry *and because one or both Ron Henry and Robyn Henry were attempting to occupy their home free from racial discrimination.*" (emphasis added). This instruction further specifies that the government must prove each element "beyond a reasonable doubt." He argues, however, that Jury Instruction No. 30 permits conviction if a defendant is motivated by race alone. To support this argument, he points to the following passage:

> The Government may satisfy its burden of proof by proving beyond a reasonable doubt that one or more of the victims' race was one of the reasons that the defendant acted. It does not matter that the defendant may have had more than one motive in performing the act as long as the defendant's race was one of his motive.
>
> In others words, if you find beyond a reasonable doubt that the defendant did the act charged ... because of the race of the victim, the Government has satisfied its burden....

We find Mr. Magleby's argument unpersuasive. In the first paragraph of Jury Instruction No. 30, the district court instructed the jury regarding the third element of the § 3631(a) charge:

> I]f you find that an act by the defendant was for the purpose of intimidating or interfering with Robyn Henry because she was associating with an African-

> American or with Ron Henry because he is African-American *and because either was occupying a dwelling,* then this element of the offense would be proven.

(emphasis added). Additionally, the sentence preceding the passage quoted by Mr. Magleby helps clarify that the following language refers only to the race prong of § 3631(a). Taking the instruction in its entirety, it is sufficiently clear that Jury Instruction No. 30 states that two factors must be satisfied, and that the language cited by Mr. Magleby simply instructs the jury as to what it can consider with respect to one of these two factors. We conclude, therefore, that Jury Instruction No.30 accurately describes the legal standard of § 3631(a). Furthermore, when combined with Jury Instruction No. 27 and looking at the jury instructions as a whole, it is clear that the jury was properly instructed that they must find beyond a reasonable doubt that Mr. Magleby targeted the Henry's both because of race and because they occupied a dwelling in order to convict him under § 3631(a). We find therefore, that Jury Instruction No. 30 is not erroneous and did not mislead the jury.

2. Jury Instruction No. 22

Mr. Magleby also argues that the district court erred in submitting Jury Instruction No. 22 to the jury, instructing the jury that they may consider, among other factors, [2] "the

---

2 This instruction also permitted the jury to consider as evidence of Mr. Magleby's intent "all the evidence in this case and the entire context in which the cross was burned," "the defendant's actions before, during and after the cross-

reaction of the victims and other witnesses to the cross burning in determining the defendant's intent" under 18 U.S.C. § 241.

Section 241 prohibits any person or persons from conspiring "to injure, oppress, threaten, or intimidate any person ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." In determining the existence of a threat in other contexts, this circuit has adopted an objective test, focusing on whether a reasonable person would find that a threat existed. *United States v. Viefhaus*, 168 F.3d 392, 396 (10th Cir. 1999). To determine whether this objective test is satisfied, this court has stated that a trier of fact may look to the reaction of the recipient of the alleged threat. *United States v. Martin*, 163 F. 3d 1212, 1216 (10th Cir. 1998). The Supreme Court has also looked to the reaction of the recipients in determining whether a threat exists, *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L. Ed.2d 664 (1969). Additionally, other circuits that have adopted a similar reasonable foreseeability test have held that evidence of the recipient's response to the alleged threat is relevant to whether a threat was made. *E.g., United States v. Fulmer*, 108 F.3d 1486, 1500 (1st Cir. 1997) ("[E]vidence of the effect of the threat upon its listener is relevant to what a reasonable person in the position of the speaker should have foreseen."); *United States v. Orozco – Santillan*, 903 F 2d 1262, 1265 (9th Cir. 1990) ("Alleged threats should be

---

burning," and the location at which the cross was burned and its nearness to the intended victims."

considered in light of their entire factual context, including the surrounding events and reaction of the listeners."). Furthermore, other circuits that have adopted a "reasonable recipient test" have also held that evidence of a recipient's response is relevant to whether a true threat exists. E.*g.*, *United States v. Malik*, 16 F. 3d 45, 49 (2nd Cir. 1994) ("In making this determination, proof of the effect of the alleged threat upon the addressee is highly relevant.") *United States v. Roberts*, 915 F.2d 889, 890-91 (4th Cir. 1990) (finding evidence of the reactions of recipients of an alleged threat relevant to whether a "reasonable recipient" would believe that a threat exists).

In the particular context of cross-burnings, the Seventh and Eighth Circuits have held that evidence of victims' reactions to a cross-burning is relevant to a defendant's intent under 18 U.S.C. § 241. *United States v. Hartbarger*, 148 F. 3d 777, 782-83 (7th Cir. 1998) (holding that victim reaction evidence is relevant under the reasonable foreseeability test); *United States v. J.H.H.*, 22 F. 3d 821, 827-28 (8th Cir. 1994) (holding that victim reaction evidence is relevant under the reasonable recipient test). We agree with these circuits and hold that victims' reactions to a cross burning may be considered by a trier of fact as relevant evidence of a defendant's intent under § 241. Consequently, we find the district court did not err in issuing Jury Instruction No. 22.

B. Sufficiency of the Evidence.

Mr. Magleby argues that the district court erred by denying his motion for judgment of acquittal because there was insufficient evidence to support his convictions under 18 U.S.C. § 241, 18 U.S.C. § 844(h)(1), and 42 U.S.C. §

3631(a). We review de novo both the sufficiency of the evidence and the denial of the motion for judgment of acquittal. *United States v. Wood*, 207 F 3d 1222, 1228 (10th Cir. 2000).

In reviewing his sufficiency of the evidence claims, we must ask "only whether taking the evidence - both direct and circumstantial, together with the reasonable inferences to be drawn there from - in the light most favorable to the government, a reasonable jury could find [Defendant] guilty beyond a reasonable doubt." *United States v. Springfield*, 196 F. 3d 1180, 1184 (10th Cir. 1999) (internal quotation marks omitted). Mr Magleby's hurdle in persuading this court to overturn the jury verdict is high. We will only overturn a jury verdict if "no reasonable juror could have reached the disputed verdict." *United States v. Whitney*, 229 F. 3d 1296, 1300-01 (10th Cir. 2000) (internal quotation marks omitted). Furthermore, "the evidence necessary to support a verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *Wood*, 207 F. 3d at 1228 (internal quotation marks omitted).

In a sufficiency challenge, we review the record as a whole and consider the collective inferences reasonably drawn therefrom. *United States v. Jenkins*, 175 F. 3d 1208, 1215 (10th Cir. 1999). Where conflicting evidence exists, we do not question the jury's conclusions regarding the credibility of witnesses or the relative weight of evidence. *Springfield*, 196 F.3d at 1184. "[W]hen a record allows for conflicting findings, we must presume that the trier of fact resolved any such conflicts in favor of the prosecution." *Wingfield v. Massie*, 122 F.3d 1329, 1333 (10th Cir. 1997) (alterations and internal quotation marks omitted).

Appendix C

1. Conviction under 42 U.S.C. § 3631(a)

"To establish a violation of 42 U.S.C. § 3631(a), the Government must prove beyond a reasonable doubt that the defendant acted with the specific intent to injure, intimidate or interfere with the victim[s'] because of [their] race and because of the victim[s] occupation of [their] home." *Whitney*, 229 F.3d at 1303 (internal quotation marks omitted). [3]Mr. Magleby argues that the district court improperly denied his motion for judgment of acquittal because the government presented insufficient evidence to prove either that he targeted the Henrys because of their race or that he acted because the Henrys occupied their home.

In making its determination regarding a defendant's intent, "a jury is permitted to draw inferences of subjective intent from a defendant's objective acts." *Wingfield*, 122 F.3d at 1333. The government may also prove intent through circumstantial evidence and surrounding

---

3 42 U.S.C. § 3631(a) imposes criminal penalties upon anyone who

"whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interferes with (a) any person because of his race, color, religion, sex, handicap ..., familial status ... or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling."

circumstances. *E.g., United States v. Prows*, 118 F.3d 686, 692 (10th Cir. 1997) ("'[B]ecause intent involves the defendant's state of mind, and is difficult to prove directly, it is usually proven by circumstantial evidence.'" (quoting Kathleen Flavin & Kathleen Corrigan, *Eleventh Survey of White Collar Crime: Mail Fraud and Wire Fraud*, 33 Am.Crim. L.Rev. 861, 869 (1996))); *United States v. Johnson*, 971 F.2d 562, 566 (10th Cir. 1992)("Direct evidence of a defendant's intent is seldom available. Intent can be proven, however, from surrounding circumstances."); *United States v. Dysart*, 705 F. 2d 1247, 1257 & n.15 (10th Cir. 1983) (upholding jury instruction permitting jury to infer intent from circumstantial evidence). "Thus, even when a defendant, as here, denies having the requisite intent, a jury may disbelieve the defendant if [his] words and acts in the light of all circumstances make [his] explanation seem improbable." *Wingfield*, 122 F.3d at 1333 (alterations and internal quotation marks omitted).

Viewing the record in its entirety together with the reasonable inferences to be drawn therefrom in a light most favorable to the government, as we must, we find that the evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt that Mr. Magleby targeted the Henrys because of their race. The jury heard evidence that Mr. Magleby knew that burning crosses were symbols of racial hatred. Mr. Magleby admitted during cross-examination that he understood the "racial hatred nature" of a burning cross when used by the Klu Klux Klan. He also admitted that he understood that a burning cross, like a swastika, was a universal symbol of racial hatred. He admitted that he knew that the general public saw a burning cross as a symbol of racial hatred. Mr. Magleby's

friends and associates testified that, prior to the cross-burning, Mr. Magleby had watched the movie *Mississippi Burning* - a movie that includes scenes of crosses being burned as symbols of hatred toward African-Americans.

Although Mr. Magleby testified that he could not remember whether L.M. had told him that the Henrys are an interracial family, claiming that he could remember being told only that the home was occupied by a "crackhead," he also testified that he first learned that Mr. Henry is African-American after returning to his house following the cross-burning. Likewise, L.M. testified that he first learned that Mr. Henry is African-American subsequent to the cross-burning. Evidence was presented at trial, however, that L.M. had signed a statement in which he told police that he had told Mr. Magleby that Mr. Henry is black prior to the cross-burning.[4] Furthermore, Andy

---

4 The government argues that L.M.'s signed statement that he told Mr. Magleby that Mr. Henry is African - American should be considered as evidence that Mr. Magleby targeted the Henrys because of race. That statement, however, was admitted as a prior inconsistent statement to impeach L.M.'s testimony pursuant to Fed.R.Evid. 613. The district court properly instructed the jury that the statement was admitted only to impeach L.M.'s credibility, not for the truth of the statement itself. Because the statement was not admitted for its truth, the jury could not properly consider it as evidence of Mr. Magleby's intent. Our review is limited to whether the jury reasonably could have found that Mr. Magleby targeted the Henrys because of race. We therefore do not consider this statement as evidence of Magleby's intent.

Whitlock testified that, after the cross-burning, both Mr Magleby and L.M. appeared to know that Mr. Henry is African-American. Liz Cannon testified that, after Mr. Magleby and L.M. returned from burning the cross in the Henry's yard, she "clearly recall[ed] them indicating the family was black" and that they discussed with their friends at the party that Mr. Henry is African-American. Tr. at 474-75. Moreover, contrary to Mr. Magleby's assertion that he felt remorse after learning that Mr. Henry is African-American, Ms. Cannon testified that Mr. Magleby appeared excited by what he had done and bragged about it. We do not question the jury's conclusions regarding the credibility of Mr. Magleby and L.M. and must presume that the jury resolved these conflicts in favor of the prosecution. *See Springfield*, 196 F.3d at 1184; *Wingfield*, 122 F.3d at 1333.

The jury also heard Mr. Henry's unrebutted testimony that he is the only African-American on his block. This evidence, combined with Mr. Magleby's and L.M.'s testimony that they targeted a specific residence, was sufficient to permit the jury to reasonably infer that it was highly unlikely that Mr. Magleby burned a cross at a home occupied by an African-American merely by coincidence.

Viewing this evidence - combined with the background of racial slurs, racist jokes, racist music, and racist internet sites - in the light most favorable to the government, we conclude that a reasonable jury could find beyond a reasonable doubt that Mr. Magleby targeted the Henrys because of their race.

Mr. Magleby also argues that the evidence was insufficient to prove that he targeted the Henrys because they occupied their home. We disagree. Mr. Magleby's own testimony regarding his understanding of the meaning of a burning cross, combined with his testimony that he intentionally burned the cross in the Henry's yard, provides sufficient evidence from which a jury could reasonably find beyond a reasonable doubt that Mr. Magleby also targeted the Henrys because they occupied their home. We therefore find that the district court properly denied Mr. Magleby's motion for judgment of acquittal on this count.

2. Conviction under 18 U.S.C. § 241 and 18 U.S.C. § 844(h)(1)

18 U.S.C. § 844(h)(1) makes illegal the use of fire to commit a felony. At trial, Mr. Magleby did not deny igniting a cross in the Henry's yard. Consequently, if the evidence is sufficient to sustain his conviction under 18 U.S.C. § 241, it is also sufficient to sustain his § 844(h)(1) conviction.

Section 241 is violated "[i]f two or more persons conspire to injure, oppress, threaten, or intimidate any person ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Section 241 requires that a "specific intent to interfere with a Federal right ... be proved." *United States v. Guest*, 383 U.S. 745, 760, 86 S. Ct. 1170, 16 L. Ed.2d 239 1966). Mr. Magleby does not argue that the Henrys do not have a federally protected right to occupy their home. Rather, Mr. Magleby contends that the evidence was insufficient to prove beyond a reasonable doubt that he

intended to "oppress, threaten, or intimidate" the Henrys in their enjoyment of that right. We disagree.

The record contains substantial evidence of Mr. Magleby's intent. Mr. Magleby testified that he decided to burn a cross to "rile people up." Tr. at 921. He acknowledged that he knew the public found cross-burning highly objectionable. He anticipated that the cross-burning would receive the attention of the news media. He admitted that he understood the message of racial hatred conveyed by a burning cross. Mr. Magleby further admitted that he intended to burn and did burn the cross in the Henrys' yard. Given this evidence of Mr. Magleby's understanding of the meaning of a burning cross to the general public and the placement of the burning cross in the Henrys' yard, we conclude that the jury could reasonably infer that Mr. Magleby intended to oppress, threaten, and intimidate the Henrys in the free exercise of their federal right to occupy property.

Furthermore, the district court properly instructed the jury that they could consider the Henrys' reactions when deciding whether Mr. Magleby's actions were intended to be a threat. Robyn Henry testified that the cross-burning "terrified" her. *Id.* at 652. She testified that she discussed with her husband moving from their neighborhood. She testified that she was "scared, confused, anxious, [and] didn't sleep well at night." *Id.* at 652. She stopped sitting on their porch because she feared for her safety. The Henrys' eleven-year-old son testified that he was scared because he "didn't know if they were still going to try to hurt [him]." *Id.* at 659. He testified that he started carrying a baseball bat with him when he would walk in his neighborhood. He also testified that he started

sleeping with this baseball bat under his bed at night. "[i]n case somebody came in [his] house." *Id.* at 653. Ron Henry testified that the significance of the cross-burning to him was "move, leave, you're not welcome here,... you were in trouble somewhere and they wanted you to leave, leave the community." *Id.* at 680. He testified that he was "afraid for [himself] as well as the members of [his] family." *Id.* at 681. He also testified that he made several modifications to his home to improve security and protect his family. The jury was shown photographs of these modifications. From this evidence, the jury could reasonably infer that a reasonable person would foresee a burning-cross in another's yard being interpreted in a like manner.

Having viewed the above evidence in the light most favorable to the government, we find that there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that Mr. Magleby intended to oppress, threaten, and intimidate the Henrys in the free exercise of their federal right to occupy property. We therefore find that the district court properly denied Mr. Magleby's motion for judgment of acquittal on these counts.

C. Evidentiary Challenges

Finally, Mr. Magleby argues that the district court erred in admitting several pieces of evidence. We review the district court's rulings on the admission of evidence for abuse of discretion, if an objection is timely made, and otherwise for plain error. *United States v. Mills*, 194 F. 3d 1108, 1113 (10th Cir. 1999).

Appendix C

Under the abuse of discretion standard, we will not overturn the district court's decision unless we are firmly convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994). In applying this standard , "we defer to the trial court's judgment because of its first-hand ability to view the witness or evidence and assess credibility and probative value." *Id.*

Under the plain error standard, Mr. Magleby must show "(1) an 'error,' (2) that is 'plain,' which means 'clear' or 'obvious' under current law, and (3) that 'affect[s] substantial rights.'" *United States v. Fabiano*, 169 F.3d 1299,1303 (10th Cir. 1999) (*quoting Johnson v. United States*, 520 U.S. 461,467, 117 S. Ct. 1544, 137 L.Ed. 2d 718 (1997). Once these requirements are met, this court may "exercise discretion to correct the error if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Fabiano*, 169 F.3d at 1303 (*quoting United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

In all of Mr. Magleby's evidentiary challenges, he argues that the district court admitted the evidence in violation of Rule 403 of the Federal Rules of Evidence. Rule 403 permits the district court to exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury." The district court has "broad discretion to determine whether prejudice inherent in otherwise relevant evidence outweighs its probative value." *United States v. Youts*, 229 F.3d 1312, 1319 (10th Cir. 2000). Evidence is not unfairly prejudicial simply because it is detrimental to a

party's case. *United States v. Martinez*, 938 F.2d 1078, 1082 (10th Cir. 1991). Evidence is unfairly prejudicial when it has "'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one.'" *Stump v. Gates*, 211 F.3d 527, 538 (10th Cir. 2000) (quoting Fed.R.Evid. 403 advisory committee's note).

1. The Henrys' Reactions

Mr. Magleby argues that evidence of what he characterizes as "the Henrys' extended and delayed reactions" is irrelevant and highly prejudicial because it did not pertain to

their reaction at the time of the incident. He also argues that the district court erred in admitting photographs of security measures taken by Mr. Henry. Additionally he argues that the district court erred in admitting a baseball bat and testimony that the Henrys' eleven-year-old son slept with it for protection following the cross-burning. Mr. Magleby objected only to the admission of the photographs and the baseball bat itself, so we review the admission of this evidence for abuse of discretion and the remainder for plain error. *Mills*, 194 F.3d at 1113.

As we discussed above, evidence of the victims' reactions to a cross-burning is probative of the defendant's intent under 18 U.S.C. § 241. The Henrys' reactions contained in the record begin immediately with their discovery of the burning cross in their yard and continue through the following days. Because the threat communicated by the burning cross did not disappear once the cross was extinguished, the Henrys' reactions in the days following the cross-burning are relevant to their

ongoing perception of that threat. We therefore find no plain error in the admission of the testimony regarding the Henrys' reactions.

The reactions of the Henrys include the security measures taken by Mr. Henry. The government offered eight photographs as illustrative aids to Mr. Henry's testimony regarding the security measures he had taken. Furthermore, the photographs are not cumulative. "Evidence is cumulative and repetitive, and if the small increment of probability it adds may not warrant the time spent in introducing it." *United States v. Davis*, 40 F.3d 1069, 1076 (10th Cir. 1994) (citations and internal quotations marks omitted). The district court reviewed the photographs and determined that each photograph shows a different security measure taken by Mr. Henry following the cross-burning. Because they aided the jury in understanding Mr. Henry's relevant testimony and are not cumulative, we find that the district court did not abuse its discretion in admitting the photographs into evidence.

The Henrys' biracial son was also a victim of the cross-burning. He lived at the home with his parents. His reactions, like those of his parents, are probative of Mr. Magleby's intent. His testimony that he carried and slept with a baseball bat for protection is certainly relevant to his reaction to the cross-burning. We find no plain error in the admission of this testimony. Furthermore, the baseball bat itself is illustrative of that testimony. We find, therefore, that the district court did not abuse its discretion in admitting the baseball bat into evidence.

Appendix C

2. [illegible] Testimony of Dr. Gerlach

Mr. Magleby argues that the district court erred in allowing Dr. Larry Gerlach to testify as an expert on hate groups and the Ku Klux Klan. Mr. Magleby did not object to this testimony at trial, so we review for plain error. *Mills*, 194 F.3d at 1113.

At trial, Dr. Gerlach testified that he is a history professor who specializes in the history of hate groups in America, particularly the Ku Klux Klan. He testified that he had authored a book on the history of the Klan in Utah. He testified briefly regarding the history of the Klan in both the United States and Utah, the symbols it used, and the groups it targeted. Finally, he testified regarding the symbol of a burning cross as used by the Klan.

The admission of this testimony raises concerns similar to those faced by the Eighth Circuit in *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994). In *J.H.H.*, a "skinhead" expert was permitted to testify in a cross-burning trial even though there was no evidence in the record that the defendant was a skinhead. *Id.* at 829. The Eighth Circuit expressed concern that the testimony implied that the defendant was, in fact, a shinhead and that it came close to permitting the factfinder to conclude that the defendant was guilty by association. *Id.*

We share these concerns and find the admission of this testimony troubling in a number of respects. First, the record contains no evidence that Mr. Magleby was a member of the Ku Klux Klan Indeed, the record is completely devoid of any evidence indicating or suggesting that Mr. Magleby was a member or sympathizer of the Ku

Klux Klan or any other hate group. At most, the evidence shows that Mr. Magleby harbored similar prejudicial attitudes toward African-Americans. This does not provide a sufficient foundation for Dr. Gerlach's testimony. Second, even if the government's testimony did establish an adequate foundation for Dr. Gerlach's testimony, the admission of his testimony, like the testimony in *J.H.H.*, "comes dangerously close" to inviting the jury to find Mr. Magleby guilty by association. *Id.*

Notwithstanding its concerns regarding the expert testimony, the Eighth Circuit held that any error in its admission was harmless due to the ample evidence of the defendants' guilt. *Id.* at 829-30. In *J.H.H.*, however, the Eighth Circuit reviewed the admission of evidence in a bench trial. *Id.* at 829. Consequently, the court reasoned that the prejudicial impact of inflammatory evidence was lessened. *Id.* In contrast, Mr. Magleby's trial was before a jury, and the prejudicial impact of inflammatory evidence may therefore be heightened. *See 1 McCormick on Evidence* § 60, at 262-63 (John W. Strong ed., 5 th ed. 1999). Neverthless, we need not decide whether the admission of Dr. Gerlach's testimony was either an "error" or "plain" under our plain error analysis because we too find that any error was harmless. "A non-constitutional error, such as a decision whether to admit or exclude evidence, is considered harmless 'unless a substantial right of [a] party is affected.'" *United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir. 1999) (quoting Fed.R.Evid. 103 (a)). We have held that an error affects a substantial right when it has a " 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66

S.Ct. 1239, 90 L.Ed. 1557 (1946)). We review "the record as a whole de novo to evaluate whether the error is harmless, examining the context, timing and use of the erroneously admitted evidence at trial and how it compares to properly admitted evidence." *United States v. Hanzlicek*, 187 F.3d 1228, 1237 (10th Cir. 1999). The burden of persuasion is on the defendant to show that the error "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

We find that Dr. Gerlach's testimony did not affect the outcome of Mr. Magleby's trial. As discussed above, the record contains substantial evidence to support Mr. Magleby's convictions. Moreover, Dr. Gerlach's testimony regarding the history of the Ku Klux Klan in America and in Utah was brief and was the only evidence regarding the Ku Klux Klan presented at trial. In addition, Dr. Gerlach's testimony regarding the symbolism of a burning cross was rendered harmless by Mr. Magleby's own admission on cross-examination that he understood the "racial hatred nature" of a cross burned by the Klan. Tr. at 980. Mr. Magleby also admitted that he understood that a burning cross, like a swastika, is a universal symbol of hatred.

Given the amount of evidence supporting Mr. Magleby's convictions, we are confident that the jury would have reached the same result even without Dr. Gerlach's testimony. We find, therefore, that any error in admitting Dr. Gerlach's testimony was harmless.

3. The Testimony Regarding James McBride

During the presentation of its case, the government introduced testimony regarding James McBride and his

views. Because Mr. Magleby objected to the admission of this evidence at trial, we review for abuse of discretion. *Mills*, 194 F.3d at 1113.

Mr. McBride is allegedly a racist and member of a hate group. Mr. Magleby testified that he had only met Mr. McBride once and that he did not know him and was not friends with him. One of Mr. Magleby's friends testified that they had conversations about Mr. McBride in Mr. Magleby's presence, but that they had not spoken to Mr. Magleby directly about Mr. McBride or his views [3:495-98]. Another of Mr. Magleby's friends testified that he had once taken Mr. McBride to a party at Mr. Magleby's where Mr. McBride "could have" given racist CDs, racist literature, and information regarding a hate group to Mr. Magleby, but that he did not know if Mr. McBride had in fact provided Mr. Magleby with such materials. Tr. at 316-17. Mr Magleby argues that the district court erred in admitting this evidence because it was irrelevant and highly prejudicial. The government argues that this evidence was relevant because it was probative of Mr. Magleby's racial animus.

Because this testimony raises concerns similar to those raised by Dr. Gerlach's testimony, we find its admission troubling. There is no evidence in the record that Mr. Magleby even discussed Mr. McBride's views with him or anyone else, let alone that he shared them. There is also no evidence that Mr. Magleby belonged to or sympathized with the "Church of the Creator," the hate group to which Mr. McBride allegedly belonged. Moreover, there was no evidence that Mr. McBride attended Mr. Magleby's party on the night that Mr.

Magleby burned the cross. It is difficult to see how the admitted testimony regarding Mr.McBride had any relevance to Mr. Magleby's intent on the evening he burned the cross. Furthermore, Mr. McBride 's testimony also comes dangerously close to inviting the jury to find Mr. Magleby guilty by association.

Notwithstanding our doubts regarding the relevance of this testimony, we need not decide whether the district court abused its discretion in admitting it because we find that it was harmless error. The admission of the testimony regarding Mr. McBride did not affect any of Mr. Magleby's substantial rights because we conclude it did not affect the outcome of the trial. *See Rivera*, 900 F.2d at 1469. As discussed in detail above, the record contains extensive evidence of Mr. Magleby's attitudes toward African-Americans. We are confident that the jury would have found that Mr. Magleby acted with racial animus even without the testimony regarding James McBride.

4. Song Lyrics

Mr. Magleby also argues that the district court erred in admitting song lyrics from racist CDs. He argues that there was no foundation for the song lyrics read during Mr. Magleby's testimony and that their probative value, if any, is substantially outweighed by their prejudicial effect. Because Mr. Magleby objected at trial to their admission, we review for abuse of discretion. *Mills*, 194 F.3d at 1113.

During its cross-examination of Mr. Magleby, the government was permitted to read into evidence the lyrics from a song entitled "When the Boat Comes In" by the band Screwdriver. The message of the passage read into

evidence is that the nation has been taken over by African-Americans, that it should be taken back, and that African-Americans should leave the country. The chorus to this song is "Nigger, nigger, get on the boat. Nigger, nigger row. Nigger, nigger get out of here. Nigger, nigger go, go, go." Tr. At 959.

We first address Mr. Magleby's argument that there was no foundation for the admission of the song lyrics. Mr. Magleby's friends Andy Whitlock testified that he heard Mr. Magleby play a CD by Screwdriver on a number of occasions. He testified that the message of one of Screwdriver's songs played by Mr. Magleby was " [j]ust get out, leave the country" and that it contained the word "nigger". *Id.* 394-95. Another of Mr. Magleby's friends, Justin Merriam, testified that, on the night of the cross-burning, Mr. Magleby was playing a CD by Screwdriver with lyrics "nigger get on your boat, nigger go." *Id.* at 331. Liz Cannon, who accompanied Mr. Merriam to Mr. Magleby's party on the evening of the cross-burning, testified that Mr. Magleby played a CD with lyrics like "nigga, nigga." *Id.* at 468. She also testified that Mr. Magleby knew and sang along with the lyrics to the racist CDs: "[Mr. Magleby] knew the lyrics on the CD'S ... as good as you can know them, he knew the lyrics. He could sing them word-for-word." *Id* at. 468-69. All of this testimony preceded the introduction of the Screwdriver lyrics during the cross-examination of Mr. Magleby. We find that this evidence provided a sufficient foundation to permit the district court to appropriately exercise its discretion in admitting the lyrics.

Appendix C

We now turn to Mr. Magleby's argument that the lyrics are irrelevant and unfairly prejudicial. Although the admission of the lyrics to the Screwdriver song was certainly harmful to Mr. Magleby's case, we conclude that its probative value outweigh d its prejudicial effect. This evidence is probative both of Mr. Magleby's racial animus under 42 U.S.C. § 3631(a) and of his intent under 18 U.S.C. § 241.

In United States v. Viefhaus, 168 F.3d 392 (10th Cir. 1999), we held that the context in which an alleged threat is made is probative of whether a "true threat" exists. *Id.* at 398. In *Viefhaus,* the defendant was convicted of making threats against, inter alia, African-Americans, Jews, and federal law enforcement on an answering machine "hotline." The defendant asserted as a defense that he lacked the intent requisite to make a true threat. We upheld the admission of racially inflammatory items as relevant to the defendant's intent.

> [T]he need to demonstrate the context in which Viefhaus uttered his remarks rendered much of the evidence of Viefhaus' racial hostility intrinsic to the crime charged in the indictment. ...
>
> ...
>
> ... The only way a jury could properly assess the sincerity of Viefhaus' beliefs, as well as the likely effect Viefhaus' message would have on objective listener, was to examine the circumstances in which the comments were made.

Id.

As did the defendant in *Viefhaus,* Mr. Magleby denies having the requisite intent under 42 U.S.C. § 3631(a)

and 18 U.S.C. § 241. The lyrics to the Screwdriver song, as well as the evidence that Mr. Magleby knew the lyrics and could sing along with them, are probative of his intent under these sections. First, § 3631(a) requires that the government prove beyond a reasonable doubt that Mr. Magleby targeted the Henrys because of their race. The lyrics and Mr. Magleby's familiarity with them are probative of his racial animus in burning the cross. Second, under § 241, the government must prove beyond a reasonable doubt that Mr. Magleby had the specific intent to "oppress, threaten or intimidate" the Henrys in the enjoyment of their federally protected right to occupy property. Context is important in determining whether a true threat has been made. *Viefhaus*, 168 F.3d at 397. The necessity of demonstrating the context in which the cross was burned renders the Screwdriver lyrics and other evidence of hostility toward the presence of African-Americans in this country intrinsic to a violation of § 241. And, as in *Viefhaus*, the only way the jury could properly determine the message conveyed by Mr. Magleby's cross-burning and the foreseeable effect it would have on the Henrys was to examine the circumstances in which the cross-burning was conceived, planned, and executed. We find that the district court did not abuse its discretion in admitting the song lyrics into evidence.

5. Testimony that Mr. Magleby Provided Alcohol and Pornography to Minors

Finally, Mr. Magleby argues that the district court erred in admitting testimony that Mr. Magleby provided alcohol and pornography to a minor. During its cross-examination of Mr. Magleby, the government inquired into

whether he allowed L.M. to look at pornography while at his home and whether he provided L.M. with alcohol. The government argues that this evidence is relevant as illustrative of the relationship between Mr. Magleby and his co-conspirator. The government also argues that this testimony permitted the jury to assess Mr. Magleby's credibility. Because Mr. Magleby did not object to this evidence at trial, we review for plain error, *Mills*, 194 F.3d at 1113.

Viewing the record as a whole and taking this evidence in context, we conclude that the jury would have reached the same verdict even without the testimony about Mr. Magleby providing alcohol and pornography to minors. The cross-examination on this subject was brief. Additionally, Mr. Magleby denied that he gave L.M. alcohol or permitted him to look at pornography. There was sufficient evidence for the jury to find Mr. Magleby guilty beyond a reasonable doubt. We find, therefore, that the admission of this testimony was not plain error.

III. Conclusion

We find that neither challenged jury instruction constituted plain error. We also find that the government presented sufficient evidence to permit the jury to find beyond a reasonable doubt that Mr. Magleby violated 42 U.S.C. § 3631(a), 18 U.S.C. § 241, and 18 U.S.C § 844(h)(1). Furthermore, we find that the district court did not commit reversible error in admitting any of the evidence challenged by Mr. Magleby.

Accordingly, we AFFIRM.

APPENDIX D - DEFENDANT'S PROPOSED JURY INSTRUCTIONS

DEFENDANT'S PROPOSED INSTRUCTION NO. 6

The second element of the offense charged in Count One is that the plan of the conspirators was to oppress, threaten, or intimidate a citizen of the United States. The words "injure", "oppress," "threaten", or "intimidate" means conduct intended to scare or frighten other persons into changing behavior. That is, the Government must show that Mr. Magleby intended to frighten Mr. and Mrs. Henry into leaving their home or dwelling.

The mere act of cross burning is not enough to establish this element. Cross Burning is a nonverbal expressive activity that is protected by the first Amendment to the United States Constitution. You cannot convict on Count One unless you find that Brad Magleby's actions were done with the intent to advocate the use of force or violence and were likely to produce such action; or that Mr. Magleby intended to threaten Mr. and Mrs. Henry, or at least intended to cause Mr. and Mrs. Henry to reasonably fear the use of imminent force or violence.

Factors you may consider are the size of the cross, the location of the cross, the number of times the defendant's burnt a cross in front of the victims, any verbal or written threats, jeers, or taunts made towards the victims, the use or display of guns, knives, or other weapons, and spitting or throwing rocks and bottles at the victims.

Authorities:

Appendix D

18 U.S.C. § 24.

United States v. Norton, 808 F.2d 908 (1st Cir. 1987).

R.A.V. v. City of Saint Paul, Minn. 505 U.S. 377,112 S.Ct. 2538, 120 L. Ed 2d 305 (1992).

U.S. v. Lee, 6 F.3d 1297 (8th Cir. 1993) (hearing en banc).

U.S. v. McDermott, 29 F.2d 404 (8th Cir. 1994).

Appendix D

DEFENDANT'S PROPOSED INSTRUCTION NO. 10

Use of Force or Threat of Force

The first element of the Section 3631 offense charged in Count Two requires the use, or attempted use, of force or threat of force. The term "force" includes the exercise and application of physical power. In common usage, force means power, violence, compulsion, or restraint exerted upon or against a person or thing.

The term "threat of force" means precisely what the term implies -- namely a threat, either by words or gestures, to inflict some harm, be it physical, mental or emotional, upon another person.

The mere act of cross burning is not enough to establish this element. Cross Burning is a nonverbal expressive activity that is protected by the First Amendment to the United States Constitution. You cannot convict on Count 2 unless you finds that Brad Magleby's actions were done with the intent to advocate the use of force or violence and were likely to produce such action; or that Mr. Magleby intended to threaten African-Americans, or at least intended to cause African-Americans to reasonably fear the use of imminent force or violence.

Factors you may consider are the size of the cross, the location of the cross, the number of times the defendant's burnt a cross in front of the victims, any verbal or written threats, jeers, or taunts made towards the victims, the use or display of guns, knives, or other weapons, and spitting or throwing rocks and bottles at the victims.

Appendix D

Authorities:

R.A.V. v. City of Saint Paul, Minn. 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed. 2d 305 (1992).

U.S. v. Lee, 6 F.3d 1297 (8th Cir. 1993) (hearing en banc).

U.S. v. McDermott, 29 F. 2d 404 (8th Cir. 1994).

Appendix D

COURT'S INSTRUCTION NO. 17

Count I of the Superseding Indictment reads as follows:

COUNT I

On or about September 7, 1998, in and around Salt Lake City, Utah, within the Central Division of the District of Utah, defendant Michael Brad Magleby and another person known to the grand jury, but not named herein, did willfully conspire and agree to oppress, threaten or intimidate Ron Curtis Henry, an African-American citizen of the United States, and his spouse, Robyn M. Henry, a white citizen of the United States, in the free exercise and enjoyment of rights secured to them by the Constitution and laws of the United States, that is, the right enjoyed by all citizens of the United States to purchase, lease and occupy real property without injury, intimidation or interference because of their race and color.

It was a part of the plan and purpose of this conspiracy to burn a cross in the yard of the dwelling located at 635 East Warnock Avenue in the city of Salt Lake City, Utah, and thereby to intimidate and to interfere with the Henry family's enjoyment and occupancy of their home.

OVERT ACTS

In furtherance of this conspiracy, and to accomplish its objective, Michael Brad Magleby and his unnamed co-conspirator did perform the following overt acts, among

others, within the Central Division of the District of Utah, on or about September 7, 1998:

1. On several occasions prior to September 7, 1998, they stated that they desired and intended to burn a cross in Salt Lake City, Utah, and made racial slurs concerning blacks.

2. On or about the evening of September 7, 1998, they constructed a cross of wood from wood kept at Michael Brad Magleby's residence. The cross was constructed by using a drill and metal screws to hold the wood together.

3. On or about September 7, 1998, they loaded the cross into Michael Brad Magleby's vehicle.

4. On or about September 7, 1998, they obtained a flammable liquid which was placed into a glass beer bottle.

5. On or about September 7, 1998, they placed the cross against a chain link fence in the yard of the residence of Ron Curtis Henry and Robyn M. Henry, which was occupied by Ron Curtis Henry and Robyn M. Henry.

6. On or about September 7, 1998, they poured a flammable liquid on the cross and set it on fire in the front yard of Henry residence.

All in violation of Title 18, United States Code, Section 241.

Appendix D

The defendant is charged in Count 1 of the Superseding Indictment with having violated Section 241 of Title 18, United State Code. The words of this statue that are pertinent to Count I read as follows:

If two or more persons conspire to oppress, threaten, or intimidate any [citizen of the United States] in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, ...they shall [be guilty of a crime against the United States].

Appendix D

COURT'S INSTRUCTION NO. 18

Section 241 of Title 18, United States Code, as charged in Count I of the Superseding Indictment has three elements to be considered:

First: That a conspiracy, agreement, or understanding existed;

Second: That the defendant knowingly and intentionally became a member of the conspiracy, agreement, or understanding;

Third: That the purpose of the conspiracy, agreement or understanding was willfully to oppress, threaten or intimidate Ron Henry and Robyn Henry in the free exercise or enjoyment of the right to occupy their dwelling, or home, without intimidation or interference because of race.

If you find from the evidence that these three elements have been established beyond a reasonable doubt with regard to a defendant, then proof of the offense is complete.

I will now explain further each of these three elements.

Appendix D

COURT'S INSTRUCTION NO. 19

First, I will explain the term "conspiracy".

A conspiracy is an agreement, understanding, or combination of two or more persons to accomplish some unlawful purpose. Thus, a conspiracy is, in a very true sense, a partnership in crime in which each member becomes the agent of every other member. The essence of the offense is the agreement to violate or disregard the law.

What the evidence must show to establish that a conspiracy existed is that the members in some way or manner, outwardly or silently, came to a mutual understanding to try to accomplish a common and unlawful plan.

However, the evidence need not show that the members of an alleged conspiracy entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. Ordinarily only the results of a conspiracy, rather than the agreement, are observable. To prove that a conspiracy existed, moreover, the Government is not required to show that all of the members of the alleged conspiracy were named or charged.

Proof of a conspiracy may be by direct evidence or by inference. Direct evidence of the agreement and purpose may come from such evidence, for example, as conversations between the conspirators themselves. When proven by inference or circumstantial evidence, the

conspiracy may be deduced from such factors as the relationship of the parties, their individual actions, and the totality of their conduct.

The evidence need not establish that all the means or methods set forth in the Superseding Indictment were agreed upon by all members; nor that those means or methods which were agreed upon were actually used or put into operation; nor that all of the persons alleged to have been members of the conspiracy were such. What the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed in an effort to accomplish some plan or purpose of the conspiracy, as charged in the Superseding Indictment; that two or more persons, including the defendant, were knowingly members of the conspiracy, as charged in the Superseding Indictment; and that the defendant knowingly contributed in some way to the accomplishment of the plan or purpose of the conspiracy.

Appendix D

COURT'S INSTRUCTION NO.20

For the Government to have proved the crime charged against a defendant in Count I you must be convicted beyond a reasonable doubt that the defendant knowingly and intentionally became a member of conspiracy.

Before the jury may find that a defendant became a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant knowingly and intentionally participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and intentionally means to participate voluntarily and intentionally. So if a defendant, or any other person, with understanding of the unlawful character of the plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, then he thereby becomes a knowing and intentional participant and a co-conspirator.

Once you have decided that a defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the goals of the conspiracy, whether or not the defendant knew what they said or did.

The extent of any defendant's participation in the conspiracy is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played a minor part in the conspiracy. A

particular defendant need only be connected by substantial evidence to a conspiracy as shown.

Furthermore, the Government is not required to prove that the parties to, or members of the agreement or conspiracy charged in Count I were successful in achieving any or all of the objects or goals of the agreement or conspiracy.

Appendix D

COURT'S INSTRUCTION NO. 21

In this case, the Government has alleged that the unlawful plan of the conspiracy was willfully "to oppress, threaten and intimidate" the Henrys in the free exercise and enjoyment of "the right enjoyed by all citizens of the United States to purchase, lease and occupy real property without injury, intimidation or interference because of their race and color." In other words, in determining whether the third element of the crime charged in Count I has been proved, you must consider the purpose of the conspiracy and the issue of the defendant's intent in joining or forming the conspiracy.

For the United States to have proved this element of the crime charged in Count I against a defendant, you must be convinced beyond a reasonable doubt that the defendant agreed "willfully" to deprive one or more of the persons named in the Superseding Indictment of a right protected by the Constitution or laws of the United States. I instruct you that an act is done "willfully" if it is done voluntarily and with the intent to do something that the law forbids, in this case, with the intent to deprive someone of a right secured by the Constitution or other laws of the United States.

Intent is a state of mind and can be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. In determining whether this element of intent was present you may consider all the attendant circumstances of this case.

Appendix D

You may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done. In other words, you may infer and find that a defendant intended all the consequences that a person, standing in like circumstances and possessing like knowledge, should be expected to result from his act or acts knowingly done.

It is not necessary for you to find that the alleged conspirators were thinking in legal terms in order to find that they acted willfully, or with the intent to interfere with a right secured by the Constitution or laws of the United States. It is not necessary that the alleged conspirators knew that the right they intended to interfere with was a right protected by the Constitution or laws of the United States. You may find that a defendant acted with the requisite intent, that is, that the defendant acted willfully, provided that you find that the defendant intended to do an act which would deprive the victims of a right protected by the Constitution or laws of the United States.

Nor does the Government have to prove that the only purpose of the conspiracy was to interfere with such a right. What the Government must prove is that the alleged conspirators intended to do an act which in fact interfered with a right protected or secured by the Constitution or laws of the United States. It does not matter that the defendant may have been acting out of anger, frustration, revenge, or some other emotion, provided the intent which I have described to you was also present.

I instruct you that the right to purchase, lease or occupy one's home without injury, intimidation, or

interference because of race and color is, in fact, recognized and secured by the laws of the United States.

A defendant does not need to have known that these rights are secured by the Constitution or laws of the United States. In fact, the Government is not required to produce direct evidence to establish that the victims' rights were actually interfered with; interference and intimidation may be inferred from violent acts or threats. Nevertheless, it is necessary that the alleged conspirators had the specific purpose to interfere with a right which is in fact protected or secured by the Constitution or laws of the United States. You may consider the nature of the fact itself in assessing the defendant's intent.

It is not necessary to prove that the only purpose of the conspiracy was to interfere with the victims' rights to occupy and associate in their dwelling without discrimination on the basis of race. Nor is it necessary that the defendant intended by his conduct to force the victims to move from their home in order for this element to be proved.

Appendix D

COURT'S INSTRUCTION NO. 22

The words "oppress," "threaten" or "intimidate" are not used in any technical sense; they are to be understood in their ordinary meaning to cover a variety of conduct intended to threaten or frighten other persons or to prevent or punish the free action of other persons. To oppress, threaten or intimidate does not require the possibility of physical force or of physical harm.

In this case, the Government has alleged that the plan and purpose of the defendant's conspiracy was to burn a cross in the Henry family's yard. If you find that there was a conspiracy whose plan was to burn a cross, and you find that the conspirators intended the cross-burning to threaten, frighten or harass the victims, then you may find that the conspirators willfully acted "to oppress, threaten, and intimidate" within the meaning of the law.

In determining whether this was a defendant's intent, you may consider all the evidence in this case and the entire context in which the cross was burned. For example, you may consider evidence regarding statements the defendant made and language he used in conversation with other persons in determining his intent. You may also consider the defendant's actions before, during and after the cross-burning in assessing his intent.

Additionally, you may consider the location at which the cross was burned and its nearness to the intended victims as a factor in determining the defendant's intent. You may also consider the reaction of the victims and other witnesses to the cross burning in determining the defendant's intent.

Appendix D

COURT'S INSTRUCTION NO. 23

Finally, with regard to the third element of Count I, the Government has alleged that the "protected right" at which the conspiracy was aimed was the right to hold and occupy property without intimidation or interference because of race.

The laws of the Government including the "Fair Housing Act" provisions of Title 42 United States Code, guarantee to all citizens the right to occupy our homes without intimidation or interference because of our race.

Appendix D

COURT'S INSTRUCTION NO. 24

Although the Superseding Indictment alleges that the statutes in question were violated by various acts which are in the Superseding Indictment joined by the conjunctive "and," it is sufficient for guilt if the evidence establishes beyond a reasonable doubt the violation of the statute by any one of the acts charged. For example, Count I of the Superseding Indictment alleges that the defendant conspired to "oppress, threaten and intimidate" Ron Henry and Robyn Henry. The proof need only establish that the defendant conspired to "oppress or threaten or intimidate any one or more of these specified victims.

Appendix D

COURT'S INSTRUCTION NO. 25

You will notice that the Superseding Indictment sets forth a number of "overt acts" for Count I. An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. In regard to Count I, the conspiracy charge, the Government is not required to prove beyond a reasonable doubt that the defendant committed any overt act set forth in the Superseding Indictment, but you may consider any overt act which you believe occurred to help determine whether the conspiracy was formed and who joined it.

Appendix D

COURT'S INSTRUCTION NO. 26

Count II of the Superseding Indictment reads as follows:

COUNT II

On or about September 7, 1998, in and around Salt Lake City, Utah, within the Central Division of the District of Utah, defendant Michael Brad Magleby and another person known to the grand jury but not named herein, by force and threat of force, and by use of fire, that is, by erecting and setting on fire a cross, did willfully intimidate and interfere with the residents of the dwelling located at 635 East Warnock Avenue, Salt lake City, Utah - including Ron Curtis Henry and Robyn M. Henry - and attempt to intimidate and interfere with said residents because of their race and color and because they were occupying the dwelling at the above named address.

In violation of Title 42, United States Code, Section 3631(a) and Title 18, United States Code, Section 2.

The defendant is charged in Count II with having violated Section 3631 of Title 42, United State Code, which states in pertinent part:

> Whoever ...: by force or threat of force willfully ... intimidates or interferes with, or attempts to ... intimidate or interfere with -

> (a) any person because of his race [or] color, ... and because he is ... purchasing or occupying ... any dwelling ...

shall be [guilty of an offense against the United States].

Appendix D

COURT'S INSTRUCTION NO. 27

In order to establish the offense described by Section 3631 charged in Count II of the Superseding Indictment, the Government must prove these five elements beyond a reasonable doubt:

First: The defendant used force or threat of force;

Second: The defendant intimidated or interfered with, or attempted to intimidate or interfere with the right of Ron Henry and Robyn Henry to occupy a dwelling located at 635 E. Warnock Avenue, Salt Lake City, Utah.

Third: The defendant engaged in the conduct described because of the race or color of one or both Ron Henry and Robyn Henry and because one or both Ron Henry and Robyn Henry were attempting to occupy their home free from racial discrimination;

Fourth: The defendant acted willfully;

Fifth: The defendant's conduct involved the use of fire, that is erecting and setting on fire a cross.

I will now explain each of these five elements in more detail.

Appendix D

COURT'S INSTRUCTION NO. 28

The first element of the Section 3631 offense charged in Count II requires the use of force or threat of force by the defendant. The term "force" includes the exercise and application of physical power. In common usage force means power, violence, compulsion, or restraint exerted upon or against a person or thing.

The term "threat of force" means precisely what the term implies - namely, a threat, either by words or gestures, to inflict some harm. While "force" itself requires some physical manifestation of violence, "threat of force" falls short of actual violence and ordinarily signifies the expression of one person's intention to act against another or to do some harm. As I instructed you before, to threaten or intimidate does not require the possibility of physical force or physical harm.

As I instructed you earlier with regard to Count I, if you find that a defendant participated in burning a cross and you find that the defendant intended by the cross-burning to threaten or frighten the victims, then you may find that he used force or the threat of force. The Government need not prove that the defendant actually intended to carry out the threat.

In determining whether the cross-burning was intended to threaten or frighten the victims, you may consider all the evidence in this case.

Appendix D

COURT'S INSTRUCTION NO. 29

For the second element of the Section 3631 offense charged in Count II, the words "intimidate" and "interfere with" have no technical meaning; they are to be understood in their ordinary meaning, and cover conduct intended to frighten or harass other persons.

It is not necessary that actual intimidation or interference be proved; an attempt to intimidate or to interfere with is sufficient. For proof of this element to be complete, the Government must prove only that the defendant's conduct was intended to intimidate or interfere with the protected right.

Intimidation or interference may be inferred from violent acts or threats.

Appendix D

COURT'S INSTRUCTION NO. 33

Count III of the Superseding Indictment reads as follows:

COUNT III

On or about September 7,1998, in Salt Lake City, Utah, within the Central Division of the District of Utah, defendant Michael Brad Magleby and another person know to the grand jury but not named herein, did knowingly use fire, that is, did ignite a flammable liquid which they poured over a cross which they had placed in the yard at 635 East Warnock Avenue, Salt Lake City, Utah, occupied by Ron Curtis Henry and Robyn M. Henry, to commit the offense of Conspiracy Against Rights of Citizens, Title 18, United States Code, Section 241, a felony prosecutable in a court of the United States, as described in Count I of the [Superseding] Indictment.

In violation of Title 18, United States Code, Section 844(h)(1).

The defendant is charged in Count III with having violated Section 844(h)(1) of Title 18, United States Code. The words of this statue that are pertinent to Count III read as follows:

(h) Whoever -

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States. ...

shall [be guilty of a crime against the United States.]

Appendix D

COURT'S INSTRUCTION NO. 34

In regard to Count III of the Superseding Indictment, you are instructed that you are not to consider this count unless the jury has first unanimously found the defendant guilty of Count I the conspiracy charge. In order to establish the defendant's guilt on Count III of the Superseding Indictment, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant committed a felony prosecutable in a court of the United States; specifically, the defendant committed the conspiracy offense alleged in Count I of the Superseding Indictment. This element has been met if the jury has unanimously found the defendant guilty of the conspiracy charge in Count I.

2. The defendant intentionally used fire in the commission and furtherance of the Court I conspiracy, and to accomplish the objective of the conspiracy; specifically, the defendant "poured a flammable liquid on the cross and set it on fire in the front yard of the Henry residence," as alleged in overt act no. 6 in Court I.

3. The Count I conspiracy was in existence at the time defendant used fire as described in element number 2 above, and the defendant was a member of the conspiracy at that time.

APPENDIX E - AFFIDAVIT OF TRIAL COUNSEL LELAND RONALD JORGENSEN IN SUPPORT OF DEFENDANT'S PETITION UNDER 28 U.S.C. § 2255

IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Case Number: 2:98 CR 565 B
vs.	
MICHAEL BRAD MAGLEBY,	Affidavit of Trial Counsel Leland Ronald Jorgensen in Support of Defendant's Petition Under 28 U.S.C § 2255
Defendant.	

I, Leland Ronald Jorgensen, being competent to testify, swear and testify as follows:

1) My name is Leland Ronald Jorgensen. I am currently admitted to practice law before the Supreme Court of Utah, the United States District Court for the District of Utah, the United States Court of Appeals for the Tenth Circuit, the United States District Court for the District of Maryland, and the United States Court of Appeals for the Fourth Circuit. In addition, I have been previously admitted to the active bars of the United States Patent Office, the Court of Appeals of Maryland, and the California Supreme Court.

2) My legal education and work experiences are accurately summarized on my resume, attached and

incorporated as Exhibit 1. To further summarize, I graduated from the University of Santa Clara School of Law with a Juris Doctor in 1980. In addition, I have earned a Bachelors of Arts degree in political science from the University of California at Davis; a Bachelors of Science degree in engineering from the University of Utah; and a Masters in Business Administration from the University of Santa Clara. I have practiced as a lawyer for over 20 years on the East Coast and in Utah, and am a patent attorney as well as a general civil and criminal lawyer. From 1991 through August 2001, I conducted a solo legal practice - emphasizing criminal law and patent work - in Salt Lake City and Sandy, Utah. Since September 2001, the United States Patent Office has employed me full-time as a patent examiner. I have participated as counsel or co-counsel in numerous federal and state court appeals.

3) Michael Brad Magleby retained me to represent him in the underlying criminal proceedings in November 1998. When Magleby was unable to pay my fees, the trial court appointed me to represent him under the Criminal Justice Act. I represented Magleby throughout all of the pretrial proceedings after he retained me, during his trial, and co-counsel during his sentencing proceedings. I did not represent him on his appeal.

4) I have reviewed the decision in *United States v. Magleby*, 241 F.3d 1306 (10th Cir., 2001), along with the docket of the United States Court of Appeals for the Tenth Circuit attached as Exhibit 2. I have also examined the single brief submitted by Magleby's appellate counsel Bel-Ami De Montreaux - accompanying this Affidavit as Exhibit 3 - and the appellee's brief of the Government.

5) Based on my knowledge of the proceedings before and during Magleby's trial, and my review of the subsequent appellate proceedings, it is my opinion that Magleby's appellate counsel failed to meet the objective standards governing the performance of appellate counsel. Most damaging, appellate counsel omitted significant and obvious issues that were likely to result in at least a partial reversal of Magleby's convictions - the issues embodied in Grounds 1, 2 and 3 of Magleby's post conviction petition - while pursuing others that were clearly and significantly weaker. Reasons for my opinion are stated below in Paragraphs 6 through 31.

Preservation of Obvious Appellate Issues During Pretrial and Trial Proceedings

6) Shortly after Magleby retained me, I researched prior cross burning cases, using both traditional research methods and computerized research. I quickly discovered that such cross-burning caselaw was limited in number but readily accessible. The Supreme Court had issued a key decision, *R.A.V. v. City of St. Paul*, 505 U.S. 305 (1992), in which it held that an ordinance that criminalized the burning of a cross that one knows or has reasonable grounds to know "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender" violated the First Amendment. *R.A.V.* had formed the basis for the en banc decision of the full Eighth Circuit to reconsider a three judge appellate decision that had upheld a jury's conviction of a cross-burner under 18 U.S.C. § 241, but had reversed his conviction under 18 U.S.C. § 844(h)(1). *United States v. Lee*, 6 F.3d 1297 (8th Cir., 1993). (en banc per curiam), *cert denied*, 114 S.Ct 1550 (1994), *reversing*

in part United States v. Lee, 935 F.2d 952 (8th Cir. 1991). The Government had originally charged Lee under the same statutes which were the basis of Counts I, II, III, and IV of the superceding indictment against Magleby.

7) Upon reconsideration in light of *R.A.V.*, the en banc Eighth Circuit reversed Lee's conviction under 18 U.S.C. § 241, holding that that statute, as applied by the trial court's instructions, had violated Lee's First Amendment rights because it permitted Lee to be convicted based purely on the protected expression inherent in cross burning. *United States v. Lee, supra,* 6 F.3d at 1300-04. The Eighth Circuit explained that the First Amendment proscribed any prosecution based on the message by cross burning, except in two circumstances:

- First, based on the imminent lawless action exception to the First Amendment, Lee could be convicted if he burned the cross with the intent to advocate the use of imminent force or violence, and if the burning was likely to produce such action. *Id.* at 1304.
- Second, Lee could be convicted if he intended to threaten the residents of the apartment with actual violence, or at least intended to cause them to reasonably fear the imminent use of force or violence. *Id.*

Lee's conviction failed to comply with these exceptions to the First Amendment because the trial court had instructed the jury that it did not need to find that Lee's actions were "a threat of physical force or the intimidation of physical fear." *Id.*, 6 F.3d at 1300-01. The Eighth Circuit remanded for a new trial, ordering the trial court to retry Lee and to

instruct the jury that it could only convict him if it found "that Lee's actions were done with the intent to advocate the use of force or violence and were likely to produce such action; or that Lee intended to threaten the residents of the Tamarack Apartments, or at least intended to cause residents of the Tamarack Apartments to reasonably fear the use of imminent force or violence." *Lee*, 6 F.3d at 1304.

8) Cross-checking R.A.V. and *Lee* using both Shepards and Westlaw, I learned that the primary holdings in each had never been overturned, modified, or even distinguished in later reported cross burning cases. Indeed, the Eighth Circuit had reaffirmed its *Lee* analysis in *United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994).

9) In addition to the First Amendment questions raised by a prosecution for cross burning, my research revealed two other obvious arguments available for defending Magleby:

> First, the original *Lee* panel had overturned Lee's conviction for using fire under 18 U.S.C. § 844(h)(1), the ten year enhancement statute. *United States v. Lee, supra*, 935 F.2d at 958. The 3 judge panel had ruled that Congress did not intend § 844(h)(1) to apply to the use of fire to burn a cross, a ruling that was left untouched by the full Eighth Circuit's en banc ruling to vacate Lee's conviction under 18 U.S.C. § 241. *Id.*, 6 F.3d 1297. But this ruling was subsequently criticized by 2 other circuit courts, which rejected similar arguments in cross burning cases. *See United States v. Wildes*, 120 F.3d 468, 471, (4th Cir. 1997) and *United States v. Hayward*, 6 F.3d 1241, 1248 (7th Cir. 1993).

- Second, the Seventh Circuit had acknowledged a potentially devastating argument to the application of 18 U.S.C. § 844(h)(1) to the commission of a conspiracy under 18 U.S.C § 241, such as was charged against Brad by Count III (use of fire to commit a conspiracy under 18 U.S.C § 241). "Since the federal felony of conspiracy, under 18 U.S.C. § 241, is complete at the time that the agreement is made, the use of fire in the case at bar gives no vitality to the commission of the conspiracy. The fire was not an aid in formulating the agreement." *United States v. Hayward, supra,* 6 F.2d at 1248 fn. 9. But the Seventh Circuit then declined to address this argument, as it had not been presented to the trial court. *Id.*

10) As a result of my research, I repeatedly brought these issues to the attention of the trial judge, Chief Judge Dee Benson. In Magleby's first and second omnibus pretrial motions, I asked the court to dismiss Counts III and IV - the ten year enhancement counts under 18 U.S.C. § 844(h)(1) - because Congress had not intended 18 U.S.C. § 844(h)(1) to apply to the use of fire in a non-destructive setting such as cross burning. I also moved to strike "Counts I and II of the Superceding Indictment [the substantive counts under 18 U.S.C. § 241 and 42 U.S.C. § 3631(a)] because Counts I and II fail to specify that Mr. Magleby's actions were done with the intent to advocate the use of force or violence or that Mr. Magleby intended to threaten Mr. and Mrs. Henry so as to cause them to reasonably fear the use of imminent force or violence."

11) Although Judge Benson denied my pretrial motions - stating that he did not believe the First Amendment was applicable to Magleby's case and that cross burning was a use of fire under 18 U.S.C. § 844(h)(1) - the holdings in both *R.A.V.* and the *Lee* decisions strongly indicate that Judge Benson's rulings were in error. I therefore determined that these were primary legal issues to be preserved for an appeal in the event that an adverse verdict was entered.

12) At the trial, both immediately following the government's case and at the close of all evidence, I moved for a judgment of acquittal, arguing in part that:

- The § 241 conspiracy charged by Count I was complete at the time that it was entered, making the § 844(h)(1) enhancement for the use of fire under Count III inapplicable;
- The statutes underlying Counts I and II as written and applied in this case were an unconsitutional proscription on a free speech right; and an unconstitutional proscription on a free speech right; and
- Congress did not intend the term "fire" in § 844(h)(1) to apply to the expressive conduct charged in Counts III and IV.

13) Although Judge Benson again denied my First Amendment arguments and contention that Congress did not intend § 844(h)(1) to apply to the conduct charged in Counts III and IV, he was obviously attracted to the argument - which I had not previously made in the pretrial motions - that the § 844(h)(1) enhancement was inapplicable to a § 241 conspiracy:

THE COURT: I know you don't want to put anything in this case that would not be properly supported by the statute, so just track this with me, both of you. Tell me -well think it through with me, it says in 18 U.S.C. § 844(h)(1) that "whoever uses fire to commit any felony which may be prosecuted in a court of the United States," and then it goes on, "shall be guilty of a crime."

Well, it is true that in your submitted jury instructions and in the way I believe you're prosecuting this case you're contending that the crime of conspiracy in Count I is complete when they entered into the agreement, it's done, he's committed the crime. *As, as a technical reading of this, he hasn't used fire to commit a felony.*

MS. WELLS: The agreement was to use fire to commit the act.

THE COURT: But you could commit this crime of conspiracy without using fire.

MS. WELLS: Under that technical reading or argument, that would be true because any agreement that you have to commit a criminal act but usually requires the commission of an additional overt act. But what we're saying is you have to look—

THE COURT: You're taking the position in this case, which he seems not to contest, that you don't need to prove an overt act.

MS. WELLS: But the agreement – we're looking – you have to look at what the agreement was, and the agreement was to interfere with the rights of by burning a cross, therefore using fire.

THE COURT: But you didn't use fire to commit that conspiracy felony.

MS. WELLS: But that was the agreement, that is our position.

THE COURT: *I think he's probably right.* [8/27/98 T pp 830-31]

* * * *

THE COURT: How do you use fire? See, if there's any sense to this statute of Congress they're saying we want to punish people heavily and much more severely and assuredly it they're out there using fire. They use the word use, not contemplate the use of. *And so just plain common sense tell me that you haven't used fire in reaching an agreement. I can't even get my mind there on it. You don't use fire to reach an agreement, even though the agreement anticipates the use of fire.* [8/27/'99 T 846]

14) Judge Benson then directed the prosecutors to redraft their instructions to "make it clear that to convict on Count 3 they need to be convinced that the overt act in the conspiracy which was he used fire in setting the cross on fire and which was part of the conspiracy was proven beyond a reasonable doubt." [8/27/99 T 853] After a recess, the judge rescinded this direction to the

prosecutors, announcing that he would allow the jury to consider Count 3 without modifying the instructions but that he expected this issue to be reargued in the event of a conviction:

> THE COURT: I want to get this other thing that you brought up straight, and I'm wrong on something. I was mistakenly - when we took our earlier break, I was mistaken. I was looking at Section 371 on conspiracy. The government's quite right in its initial submission under Section 241, conspiracy to violate civil rights, there is no requirement to prove overt acts. And I was looking at 371. Frankly, it made everything a little easier. We're back to 241. You will be entitled to the instructions you submitted, it appears to me, on that count.
>
> I am inclined on Count 3 to allow it, I will allow it, but you will have to tell the jury that they need to find that the conspiracy was a continuing crime that included the use of of fire are part of a conspiratorial crime, not crime of conspiracy. But I didn't want to give you the burden of changing all these jury instructions when it was by the mistake of the Court. Congress for some reason did not put the same overt act requirement in 241 that it has in 371, the general conspiracy statute.
>
> *Frankly, it appears to me that it makes Mr. Jorgensen's argument about the legality, the legal propriety, of Count 3 a little stronger. But we'll take it up at sentencing and hopefully get this whole thing*

sorted out at sentencing. I didn't want to leave you with that misadvice. [8/27/99 T 859-60]

15) During Judge Benson's conference with counsel concerning jury instructions, I also repeatedly objected to the Government's instructions concerning Counts I and II, and requested the judge to instruct the jury that the First Amendment required it to find that Magleby acted with either the intent to advocate the use of imminent force or violence and were likely to produce such action, or the intent to threaten the Henrys with actual violence or to reasonably fear the imminent use of force or violence. [8/31/99 T 1103, 1114-17, 1123] Prior to trial, I had obtained jury instructions concerning this requirement that were affirmed by the Eighth Circuit in *United States v. McDermott, supra*, 29 F.3d 404 (1994). I used these instructions to prepare Defendant's Proposed Instructions 6 & 10 [attached to the Points and Authorities in Support of Defendant's Petition Under 28 U.S.C. § 2255 as Exhibits E and F].

16) After Magleby's conviction but before his sentencing, attorney Bel-Ami J. de Montreaux informed me that he would be taking over Brad's representation and that I was out. Without consulting me, Mr. de Montreaux then filed a sealed motion for new trial based on the prior professional and social relationship between Judge Benson and U.S. Attorney Paul Warner. In my opinion, the timing and submission of this motion was poor judgment, particularly as it distracted from the serious sentencing issues still facing Judge Benson, especially the application of the ten year sentencing enhancement under 18 U.S.C. § 844(h)(1). Moreover, Mr. de Montreaux lacked any familiarity with the true legal

issues arising from the trial, and the actual conduct of the trial judge and his treatment of counsel and the parties.

17) I filed an *ex parte* motion to withdraw as counsel. Two days before Magleby's sentencing, Judge Benson issued an order denying my *ex parte* motion. I immediately prepared an objection to the presentence report and again moved to dismiss Count III, the § 844(h)(1) ten year enhancement charge.

Appellate Counsel's Failure to Argue the Obvious and Significant Issues While Pursuing Clearly Weaker and Less Significant Issues

18) Appellate counsel's failure to effectively argue the most obvious and significant issues – as embodied in Grounds 1,2, and 3 of Magleby's post conviction petition under 28 U.S.C. § 2255 – is apparent from both the appellate docket and Magleby's brief. As shown by the attached docket from the United States Court of Appeals for the Tenth Circuit, Magleby's new counsel missed court-ordered deadlines for submitting the appellant's brief at least three different times, twice after the court had already notified counsel that he would not be allowed any further extensions. Moreover, Magleby's counsel twice filed deficient briefs, resulting in further extensions of time and orders for the filing of a corrected brief and appendix. Such dilatory conduct and disregard for the rules is deficient under the normal objective standards governing appellate counsel, and is likely to erode the appellate judges' confidence in the credibility and persuasiveness of any appellant's arguments.

19) Magleby's brief itself, even in the form that was finally accepted by the U.S. Court of Appeal, is further evidence of counsel's failure to effectively represent Magleby. Rather than pursuing the most obvious and significant issues raised in the lower court, appellate counsel took a shotgun approach, identifying ten issues including sub-issues, beginning with the question of whether the court erred by denying Magleby's motion for judgment of acquittal based on the insufficiency of the evidence.

20) Appellate counsel's litany of issues, although numerically impressive, completely missed the most significant issue of all – whether Magleby was convicted in violation of the First Amendment. As shown above, I had repeatedly preserved this issue – embodied by Grounds 1 and 2 of Magleby's post conviction petition – throughout the trial and pretrial proceedings. Moreover, this issue involved a construction of Constitutional law which the appellate court would consider using a *de novo* standard of review because it had been preserved in both objections to the indictments, and objections to the trial court's jury instructions. This issue also involved the application of two obvious precedents – *R.A.V. v. City of St. Paul*, 505 U.S. 305 (1992) and *United States v. Lee, supra*, 6 F.3d 1297. *R.A.V.* is of course binding, as it represents the ruling of the Supreme Court, and shows that the act of cross burning can be speech protected under the First Amendment. *Lee* is directly applicable on both the law and the facts, has never been criticized, and is a convincing precedent that the United States Court of Appeals for the Tenth Circuit would pay extremely close attention to if cited. Yet Magleby's appellate counsel failed to even cite either decision, much less argue the

obvious implications arising from Judge Benson's refusal to require the Government to prove that the message communicated by Magleby's act of cross burning was speech outside of the First Amendment.

21) Magleby's appellate counsel's failure to cite *United States v. Lee, supra,* 6 F.3d 1297 is particularly inexplicable because he did cite the original three judge *Lee* decision. *See* Appellant's Brief p. 31. But Appellate counsel completely missed the fact that the full Eighth Circuit had reconsidered the original *Lee* decision *en banc,* ruling that Lee's § 241 conviction had violated the First Amendment. *See United States v. Lee,* 935 F. 2d 952 (8th Cir., 1991), *rehearing en banc* 6 F.3d 1297 (8th Cir., 1993), *cert denied,* 114 S.Ct 1550 (1994).

22) As any qualified appellate attorney knows, the generally most favored issues for appeal arise from rulings on the law such as in disputed jury instructions. Such rulings are typically reviewed *de novo,* with the evidence considered in the light most favorable to the appellant. By contrast, as shown by the Tenth Circuit *Magleby* decision rejecting numerous less favorable issues selected by Magleby's appellate counsel, evidence supporting a trial court's ruling on a motion for judgment of acquittal is reviewed in the light most favorable to the Government, and evidentiary rulings are typically reviewed either for abuse of discretion, or plain error if unobjected to. Rulings on jury instructions that were not objected to are also reviewed for plain error. By failing to pursue the First Amendment grounds and instructions that had been vigorously contested below in favor of less significant issues that were either not litigated or else subject to a standard much more deferential to the

prosecution or the trial judge, appellate counsel subjected Magleby's appeal and the evidence in support of his defense to the least favorable standard of scrutiny by the United States Court of Appeals.

23) As shown by the transcripts, Judge Benson's failure to recognize the applicability of the First Amendment constraints on the Government's prosecution based on a cross burning message was highly prejudicial to Magleby's defense. Uncontradicted testimony showed that Magleby's decision to burn the cross in front of the Henry's home was a last minute alternative that L.M. suggested after Magleby and L.M. had failed to carry out their original plan to burn the cross at the gang members' home. On the stand Magleby consistently denied any intent to intimidate the Henrys, and he claimed that he did not even consider their reactions until the following day. Moreover, his drunken state and unclear thinking were corroborated by other witnesses, including the Government's witnesses. Magleby provided ample character and other testimony by which the jury could find that his act of cross-burning was an aberration, not the result of any specific intent to terrorize his victims with a threat of imminent violence or force.

24) The issue embodied by Ground 3 of Magleby's post conviction petition - whether Magleby could use fire to commit the offense of conspiracy under § 241 where his use of fire was the objective of the conspiracy, not the conspiracy itself - was also an issue that Magleby's appellate counsel should have pursued. As recited in above paragraphs 13-14, the transcripts show that Judge Benson had quickly comprehended and focused on this argument, and was very close to

dismissing Count III based on it. In light of the compelling logic behind it, as well as the numerous legal precedents distinguishing the act of conspiracy itself from any objectives or overt acts associated with the conspiracy, this was also an obvious and logical issue to present and argue in Magleby's appeal.

25) Ground 3 of Magleby's post conviction petition also incorporates the argument that the phrase "uses fire" in 18 U.S.C. § 844(h)(1) was too ambiguous and vague to apply to a § 241 conspiracy based on cross burning. This argument is based in part on legislative history behind § 844(h)(1), history that had already persuaded the original *Lee* panel to reverse Lee's conviction under 18 U.S.C. § 844(h)(1) based on cross burning. *United States v. Lee, supra,* 935 F.2d at 958. Although the Seventh and Fourth Circuits have rejected this analysis, it has never been ruled on by the United States Court of Appeals for the Tenth Circuit. It is certainly an obvious argument that should be made, particularly in combination with the argument that Congress did not intend to apply a ten year sentencing enhancement under § 844(h)(1) to the already completed conspiracy to burn a cross in violation of 11 U.S.C. § 241.

26) None of the issues selected by Magleby's appellate counsel even approached the significance of the issues embodied in Grounds 1, 2, and 3 of Magleby's post conviction petition. In my opinion, issues 1 and 3 in Magleby's appeal brief - questioning the sufficiency of the evidence to support his convictions under Counts I, II and III - were issues that should only have been asserted after pursuing the First Amendment and statutory issues reflected in Grounds 1, 2, and 3 of Magleby's post

conviction petition. This is because a sufficiency of the evidence review requires the application of *correct* legal principles to the record evidence. The obvious issues presented by Magleby's post conviction petition require rulings of law that appellate counsel should have sought a decision on *before* asking the Tenth Circuit to engage in any sufficiency of the evidence review. This is especially true since a sufficiency of the evidence review is conducted in the light most favorable to the Government.

27) Although Magleby's appellate counsel attacked the jury instructions in Issues 2 and 4 of Magleby's brief, both issues were so weak that they approach frivolousness. As to Issue 2, the trial court's jury instructions *repeatedly* requires the jury to find that Magleby had acted in order to interfere with the Henry family's right to occupy their home. *See* Trial Court Instruction Nos. 17, 18, 21, 23, 26, 27, 30 and 31. As to Issue 4, the law is well-established in the arena of cross burning and similar cases based on threatening speech that intent can be inferred from the victims' reactions to the purported threat. *See, e.g., Watts v. United States*, 394 U.S. 705 (1969); *United States v. Hartberger*, 148 F.3d 777, 782-785 (7th Cir., 1998) (and cases cited therein); *United States v. J.H.H.*, 22 F.3d 821, 827-28 (8th Cir., 1994).

28) Magleby's appellate counsel's final issue – listing six sub-issues based on the admission of various items of evidence – for the most part reflected appellate counsel's lack of familiarity with the record. As the Tenth Circuit recognized, subissue a – the testimony regarding the Ku Klux Klan provided by Dr. Gerlach – and subissue b – testimony concerning Magleby's purported association with racist James McBride – had some merit.

U.S. v. Magleby, supra, 241 F.3d 1316-18. But the other sub-issues had almost no substantive merit, particularly in an appellate setting where such matters are reviewed for abuse of discretion. Moreover, the record – particularly Magleby's own testimony – shows that these matters were at most collateral, and that the salient facts surrounding the actual cross burning were largely undisputed. Indeed, my opinion is that the Government's repeated attempts to paint Magleby in the worst possible light by piling on weak and peripheral evidence backfired, and possibly contributed to the jury's lengthy deliberations and apparent initial resistance – as reflected in its handwritten communications to the trial judge – in reaching a guilty verdict.

29) Appellate counsel's failure to effectively represent Magleby is also reflected in the Statement of Facts contained in Magleby's brief. The Statement of Facts begins by conceding that Magleby would join certain friends of his in expressing racist views, telling racist jokes, and accessing racist web sites. In fact, all of this evidence was heavily disputed, both in my cross examination of Government witnesses, and by the testimonies of defense witnesses – including a close friend of Magleby who had been married to an African American and was engaged to a Hispanic; an African-American co-worker; a Polynesian co-worker, and by Magleby himself. Although the jury convicted Magleby of certain crimes, nothing proves that it adopted this negative view of him, and Magleby's appellate counsel lacked any good reason to begin his brief by conceding that Magleby was guilty of the Government's collateral allegations.

30) Besides showing that Magleby's appellate counsel repeatedly missed court deadlines and filed deficient briefs, the docket for the U.S. Court of Appeals shows that he waived Magleby's right to submit a reply brief. I have read the Government's brief, and note that it contains factual errors and legal arguments that warranted a response. In more than twenty years of practice and as participating counsel in numerous appeals, I have never previously seen a serious and substantial appellate proceeding in which a properly-represented appellant rested without submitting a reply brief.

Conclusion – Magleby Was Denied Effective Assistance of Appellate Counsel

31) The critical dispute from the viewpoint of both the Government and the defense was over Magleby's intent, not the largely undisputed events surrounding the cross burning. The trial judge's unwillingness to require the Government to prove that Magleby specifically intended his message of cross burning to either incite imminent violence or to put the Henrys in reasonable fear of such imminent violence was the most obvious and significant issue that had been preserved for appeal. Moreover, the judge's use of alternative language urged by the Government to define the element of intent was prejudicial to Magleby. Additionally, I had repeatedly attacked the application of the § 844(h)(1) ten year enhancement for using fire, and the trial judge himself had voiced the persuasive logic behind this argument. Appellate counsel's failure to pursue these obvious and significant issues in favor of the obviously weaker arguments he made in Magleby's brief

was, in my opinion, a failure to provide Magleby with effective assistance of counsel under the Sixth Amendment.

I DECLARE UNDER PENALY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON APRIL 14, 2002

_____

Leland Ronald Jorgensen

(3)

Supreme Court, U.S.
FILED
MAR 2 3 2006
OFFICE OF THE CLERK

No. 05-787

In the Supreme Court of the United States

MICHAEL BRAD MAGLEBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether counsel for petitioner on direct appeal provided ineffective assistance by omitting a First Amendment challenge to the jury instructions on the charges of conspiracy to violate civil rights, in violation of 18 U.S.C. 241, and intimidation or interference with housing rights on the basis of race, in violation of 42 U.S.C. 3631.

2. Whether counsel for petitioner on direct appeal provided ineffective assistance by omitting a challenge to his conviction for a use of fire in the commission of a felony, 18 U.S.C. 844(h)(1), when the felony was a conspiracy to violate civil rights, in violation of 18 U.S.C. 241.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Banks v. *Reynolds*, 54 F.3d 1508 (10th Cir. 1995) .. 13, 15
Cargle v. *Mullin*, 317 F.3d 1196 (10th Cir. 2003) 14
Evitts v. *Lucey*, 469 U.S. 387 (1985) 10
Gray v. *Greer*, 800 F.2d 644 (7th Cir. 1986) 13
Jones v. *Barnes*, 463 U.S. 745 (1983) 12
Mayo v. *Henderson*, 13 F.3d 528 (2d Cir.), cert. denied, 513 U.S. 820 (1994) 13, 14, 15
Neill v. *Gibson*, 278 F.3d 1044 (10th Cir. 2001), cert. denied, 537 U.S. 835 (2002) 14
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 8
Smith v. *Murray*, 477 U.S. 527 (1986) 11, 12
Smith v. *Robbins*, 528 U.S. 259 (2000) 11, 15
Strickland v. *Washington*, 466 U.S. 668 (1984) ... 5, 6, 12
United States v. *Arnold*, 117 F.3d 1308 (11th Cir. 1997) 10
United States v. *Colvin*, 353 F.3d 569 (7th Cir. 2003), cert. denied, 543 U.S. 925 (2004) 9, 19
United States v. *Cook*, 45 F.3d 388 (10th Cir. 1995) 14
Virginia v. *Black*, 538 U.S. 343 (2003) 4, 7, 17, 18
Wisniewski v. *United States*, 353 U.S. 901 (1957) 14

Constitution and statutes: Page

U.S. Const. Amend. I 6, 7, 8, 18, 19
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. VII, § 708(a)(3), 110 Stat. 1296 3
18 U.S.C. 241 ..... *passim*
18 U.S.C. 844(h)(1) (1994) 3
18 U.S.C. 844(h)(1) (2000) ..... *passim*
18 U.S.C. 1512(b)(3) 2, 3
28 U.S.C. 2255 ..... 2, 4, 5, 8, 15, 19
42 U.S.C. 3631 ..... *passim*
42 U.S.C. 3631(a) 2

In the Supreme Court of the United States

No. 05-787

MICHAEL BRAD MAGLEBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 420 F.3d 1136. The opinion of the district court (Pet. App. 22a-41a) is unreported. The prior opinion of the court of appeals affirming petitioner's conviction on direct appeal (Pet. App. 42a-71a) is reported at 241 F.3d 1306.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2005. A petition for rehearing was denied on September 20, 2005 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on December 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted of: (1) conspiracy to violate civil rights, in violation of 18 U.S.C. 241; (2) intimidation or interference with housing rights on the basis of race, in violation of 42 U.S.C. 3631(a); (3) use of fire to commit a felony, in violation of 18 U.S.C. 844(h)(1); and (4) tampering with a witness, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 46a. He was sentenced to 144 months of imprisonment. On direct appeal, the court of appeals affirmed. Pet. App. 42a-71a. Petitioner then filed a motion under 28 U.S.C. 2255 to set aside the conviction and vacate the sentence. The district court denied the motion. Pet. App. 22a-41a. The court of appeals again affirmed. Pet. App. 1a-19a.

1. On September 6, 1996, petitioner invited five friends to come to his house for a barbeque. The group discussed their dislike for people of other races, listened to racist music, and viewed racist web sites. Petitioner and a minor friend, L.M., built a cross that they intended to burn in front of the house of a group from the Kingdom of Tonga that had moved into the neighborhood, and they purchased gasoline to set the cross aflame. When they arrived at the house, however, there were several men outside the house, and they decided not to carry out their plan there. Pet. App. 2a.

There was evidence that L.M. then suggested that they burn the cross at the house of a black man instead; petitioner argued that L.M. had said "crackhead" instead of "black man." Petitioner and L.M. proceeded to burn the cross outside the home of Ron and Robyn

Henry and their eleven-year-old son. Ron is an African American and his wife Robyn is white. Pet. App. 45a.

2. The jury found petitioner guilty of conspiracy to violate civil rights, in violation of 18 U.S.C. 241, and intimidation or interference with housing rights on the basis of race, in violation of 42 U.S.C. 3631. The jury also found him guilty of using fire to commit a felony, in violation of 18 U.S.C. 844(h)(1); the predicate felony was the violation of 18 U.S.C. 241.[1] Under Section 844(h)(1), a defendant receives a prison sentence of ten years for a first conviction.[2] Petitioner was also found guilty of tampering with a witness, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 23a.

3. On appeal, petitioner argued that a jury instruction on the housing rights count was mistaken, because it permitted conviction if the defendant was motivated by race alone, rather than requiring proof that defendant was motivated both by race and by the fact that the victims were occupying a dwelling. Pet. App. 49a. Petitioner also challenged an instruction that the jury could consider "the reaction of the victims and other witnesses to the cross burning in determining the defendant's intent." *Id.* at 49a-50a. Petitioner further challenged the sufficiency of the evidence to support his civil rights, housing rights, and use of fire convictions.

---

[1] The jury also returned a verdict of guilty on an additional count under Section 844(h)(1) charging use of fire to commit the Section 3631 housing rights violation, but the trial court dismissed that count after trial. Pet. App. 23a.

[2] Petitioner quotes (Pet. 3) an earlier version of 18 U.S.C. 844(h)(1) (1994) that provided for a five-year sentence for a first offense. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Tit. VII, § 708(a)(3), 110 Stat. 1296 (amending statute to increase punishment).

Id. at 51a-52a. Finally, petitioner challenged several evidentiary rulings of the district court. See *id.* at 59a-71a. The court of appeals rejected each of those challenges. *Id.* at 46a-71a.

3. Petitioner filed a motion under 28 U.S.C. 2255 in district court, seeking to have his conviction set aside and his sentence vacated. Pet. App. 22a. He argued that (1) his convictions under Sections 241 and 3631 "were based on * * * speech protected by the First Amendment;" (2) the "use of fire" violation under 18 U.S.C. 844(h)(1) "does not apply to all felonies;" (3) "the application of § 844(h)(1) to the act of cross-burning violates the First Amendment;" and (4) "18 U.S.C. 844(h)(1) was impermissibly applied to this case because the conspiracy entered into by the defendant was completed before he used fire in connection with any felony." Pet. App. 27a. Because those claims were not raised on direct appeal, they were subject to a procedural bar unless petitioner could show cause and prejudice. *Id.* at 26a. He sought to make that showing by advancing an additional claim that his counsel on direct appeal had provided ineffective assistance. *Id.* at 26a-27a.

The district court rejected petitioner's claim of ineffective assistance. The court examined each portion of the jury instructions that petitioner claimed permitted the jury to convict him for protected speech rather than a "true threat" of physical violence. Pet. App. 32a; see *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (defining "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). The court concluded that "the jury instructions were adequate to en-

sure that [petitioner] was convicted only for * * * a threat of physical harm with the intent to advocate force; or at least that he intended to cause the [victims] to reasonably fear the use of imminent force." Pet. App. 37a.

With respect to Section 844(h)(1), the court rejected petitioner's argument that it applies only to arson, holding that the language of the statute is not so limited. Pet. App. 39a. The court also determined that Section 844(h)(1) is not a content-based restriction on speech when applied to cross-burning, because the sentence "for the use of fire is unrelated to the conduct's expressive content." *Id.* at 37a. Finally, the court held that the Section 844(h)(1) charge could be based on petitioner's conspiracy conviction, because the act of burning the cross was an overt act in petitioner's "ongoing [conspiracy] offense." *Id.* at 40a.

The district court concluded that "because the substantive merits of petitioner's claims have no merit, his appellate counsel was not constitutionally ineffective." Pet. App. 40a. See *ibid.* ("[Petitioner's] counsel's actions did not fall below an objective standard of reasonableness, and petitioner was not prejudiced by his counsel's failure to raise these issues on appeal.").

4. On appeal of the denial of his Section 2255 motion, petitioner renewed his argument that his counsel on direct appeal had provided ineffective assistance and that he was therefore excused from his procedural default. Adopting the standard in *Strickland* v. *Washington*, 466 U.S. 668, 687-688 (1984), the court held that petitioner had the burden of showing that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." Pet. App. 5a (quoting *Strickland*, 466 U.S. at 687-688, 694). The court of appeals held that, based on "the state of the law at the time of [petitioner's] direct appeal," *id.* at 5a, petitioner's appellate counsel did not provide ineffective assistance, because counsel's omission of the claims now asserted by petitioner was not unreasonable under *Strickland*. *Id.* at 8a, 17a, 19a.

a. The court of appeals held that the failure of appellate counsel to challenge the Section 3631 instructions on First Amendment grounds was not unreasonable. Petitioner argued that those instructions permitted conviction for conduct that did not constitute a "true threat" of violence and therefore was protected by the First Amendment. The court noted that the primary instruction on Section 3631 stated that the government had to prove that "[t]he defendant used force or threat of force." Pet. App. 8a (emphasis omitted). A further instruction explained:

> [t]he term 'force' includes the exercise and application of physical power. In common usage force means power, violence, compulsion, or restraint exerted upon or against a person or thing.

Id. at 9a. Rejecting petitioner's argument that the instruction did not require the threat of physical violence or force, the court explained that "[t]he natural reading of the language in the instruction is that it is referring to physical force." *Id.* at 10a.

The court of appeals also rejected petitioner's claim that another portion of the same instruction, which stated that "to threaten or intimidate does not require the possibility of physical force or physical harm," Pet. App. 10a, permitted conviction without a threat of phys-

ical violence or force. The court held that "the quoted sentence can best be understood as explaining that the Government need not prove that the threat of force could or would actually be carried out." *Id.* at 11a (citing *Virginia* v. *Black*, 538 U.S. at 359-360).

b. The court also held that the failure of appellate counsel to challenge the Section 241 jury instructions on First Amendment grounds was not unreasonable. Pet. App. 11a-14a. The Section 241 instructions required the government to prove

> [t]hat the purpose of the conspiracy * * * was willfully to oppress, threaten or intimidate Ron Henry and Robyn Henry in the free exercise or enjoyment of the right to occupy their dwelling, or home, without intimidation or interference because of race.

Id. at 12a. The instructions added:

> The words 'oppress,' 'threaten,' or 'intimidate' are not used in any technical sense; they are to be understood in their ordinary meaning to cover a variety of conduct intended to threaten or frighten other persons or to prevent or punish the free action of other persons.

Ibid.

The court stated that the instructions were "flawed" because they "never define *threat* as requiring a threat of force" but instead "assert that *oppress, threaten, and intimidate* are used in their everyday sense." Pet. App. 13a. The court noted, however, that counsel may reasonably "forego a challenge to an improper instruction" if "the error is likely to be considered harmless." *Ibid.* The court found that "[t]hat likelihood is considerable here." *Ibid.* The court noted that "the jury's verdict on the § 3631 charge almost surely reflected a

finding that [petitioner's] cross burning constituted a willful threat of force" and that "the cross burning was the only object of the alleged § 241 conspiracy." *Id.* at 14a. In those circumstances, "it would be passing strange if the jury did not believe that [petitioner] and L.M. had conspired to threaten *force*." *Ibid.* The court added that, although petitioner's argument that the instruction was flawed relied on Eighth Circuit precedent in cross-burning cases, there was an "absence at the time of the appeal of any authority from the Supreme Court or this circuit adopting the law set forth in the Eighth Circuit cross-burning decisions." *Ibid.* The court concluded that, under all the circumstances, it "cannot say that it was objectively unreasonable for [petitioner's] appellate counsel not to raise the First Amendment challenges to his convictions under §§ 241 and 3631." *Ibid.*

c. The court also held that petitioner's appellate counsel had not been ineffective in failing to raise either of the Section 844(h)(1) claims petitioner advanced in his Section 2255 motion.[3] The court concluded that appellate counsel had not acted unreasonably in failing to claim that his Section 844(h)(1) conviction violated the First Amendment because it imposed special punishment on him because of the content of his speech. The court explained that increased punishment for "especially pernicious" threats, Pet. App. 16a, does not conflict with this Court's decision in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), which prohibited basing punishment for even unprotected speech on the point of view being expressed. The court noted that threats

---

[3] On appeal, petitioner abandoned his claim that Section 844(h)(1) applies only to arson.

that make use of fire and are therefore subject to punishment under Section 844(h)(1) "exhibit to a higher degree than other felonious threats the characteristics that makes threats proscribable," because such threats have "the potential not only to frighten in a distinctly profound way but also * * * to cause the threatened harm to person or property." Pet. App. 16a. Accordingly, the court concluded that the merits of the claim that counsel failed to raise were "highly questionable." *Ibid.* See also *id.* at 17a ("doubtful").

The court also concluded that counsel had not acted unreasonably in failing to attack his Section 844(h)(1) conviction on the ground that that provision cannot be based on a Section 241 conspiracy. The court recognized that, in a decision that postdated petitioner's appeal by two years, the Seventh Circuit had agreed with petitioner's argument, reasoning that unless fire is used in the process of reaching agreement, a conspiracy that does not require proof of an overt act cannot be the predicate felony under Section 844(h)(1). Pet. App. 17a (citing *United States* v. *Colvin*, 353 F.3d 569 (7th Cir. 2003) (en banc), cert. denied, 543 U.S. 925 (2004)). The court stated however, it was "not sure" it "would embrace *Colvin*." *Ibid.* The court discussed a number of ways in which conspiracy is a "*continuing* offense, encompassing the acts performed in furtherance of the agreement."[4] The court determined that an ultimate

---

[4] See Pet. App. 17a ("venue is proper wherever acts in furtherance of the conspiracy occur"); *id.* at 17a-18a (noting that for the exception to hearsay for statements of a co-conspirator "the statement need not further the *attainment* of an agreement; it is enough that it further an *object* of the agreement"); *id.* at 18a ("for statute-of-limitations purposes, a non-overt-act conspiracy is not committed simply on the date the agreement is made but 'is deemed to continue as long as its

decision on the merits of the question whether Section 844(h)(1) applies to a conspiracy under Section 241 was unnecessary, however, because at the time of direct appeal "[n]o decisions had yet adopted [petitioner's] view," and therefore his counsel's failure to raise the issue was not unreasonable under *Strickland*. *Id.* at 18a.

ARGUMENT

Petitioner argues that further review is warranted to address the court of appeals' application of the *Strickland* standard to his claim of ineffective assistance of appellate counsel and to address his substantive claims that the jury instructions in this case did not adequately protect his First Amendment rights and that a Section 844(h)(1) conviction cannot be based on a Section 241 conspiracy. The court of appeals' application of the *Strickland* standard to the particular facts of this case does not conflict with any decision of any other circuit and does not warrant further review. The merits of the substantive issues petitioner discusses are not squarely before the Court in this case, which arises on collateral review and presents only the question whether petitioner's appellate counsel acted unreasonably. Those substantive issues would not in any event warrant further review.

1. Petitioner urges the Court to grant certiorari in order to resolve the "open * * * question of what standards to apply to ineffective assistance of appellate counsel" claims. Pet. 14 (quoting *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985) ("We therefore need not decide the

---

purposes have neither been abandoned nor accomplished, and no affirmative showing has been made that it has terminated'") (quoting *United States* v. *Arnold*, 117 F.3d 1308, 1313 (11th Cir. 1997)).

content of the appropriate standards for judging claims of ineffective assistance of appellate counsel.")). Petitioner admits (*ibid.*) that all of the courts of appeals have applied the *Strickland* standard to such claims, as did the court of appeals in this case. See Pet. App. 5a. Indeed, this Court's own decisions have applied the *Strickland* standard to claims of ineffective assistance of appellate counsel.

a. In *Smith* v. *Murray*, 477 U.S. 527 (1986), this Court applied the *Strickland* standard to a claim of ineffective assistance of appellate counsel. See *id.* at 535 ("Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*").[5] In *Murray*, the prisoner claimed that counsel rendered ineffective assistance by failing to raise on appeal the issue of admissibility of testimony of a court-appointed psychiatrist who testified at the sentencing phase about a past sexual offense of a defendant convicted of rape and murder. *Id.* at 529-530. Counsel had objected to the admission of the testimony at trial, but did not raise the issue on direct appeal. *Id.* at 531. This Court noted that "various forms of the claim [that the prisoner's counsel omitted on direct ap-

---

[5] See *Smith* v. *Robbins*, 528 U.S. 259, 285 (2000) (citing *Smith* v. *Murray*, 477 U.S. 527 (1986), and characterizing it as "applying *Strickland* to claim of attorney error on appeal"); *id.* at 287-288 (determining that the *Strickland* standard applies where appellate counsel has complied with applicable state procedure and found a criminal defendant's appeal to be frivolous and stating "[i]t is no harder for a court to apply *Strickland* in this area than it is when a defendant claims that he received ineffective assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim").

peal] had been percolating in the lower courts for years at the time of his original appeal." *Id.* at 537. But the Court determined nonetheless that counsel's failure to raise the claim on direct appeal had not been unreasonable under *Strickland*. The Court explained that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Id.* at 536 (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983)). The Court expressly reaffirmed the principle that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the [attorney's] conduct from counsel's perspective at the time." *Ibid.* (quoting *Strickland*, 466 U.S. at 689) (brackets in original). See *id.* at 534 (characterizing as "irrelevant" a decision by the appellate court that heard petitioner's appeal that was reached after that appeal).

The court of appeals in this case followed the reasoning of *Murray*. As in *Murray*, petitioner's appellate counsel omitted issues on appeal that had been preserved at trial, and petitioner argues that he gained no "tactical advantage" in doing so. Pet. 16. Like this Court in *Murray*, the court of appeals concluded that counsel's performance on appeal had to be judged in light of "the state of the law at the time of" counsel's action—*i.e.*, at the time of petitioner's direct appeal. Pet. App. 5a. And like this Court in *Murray*, the court of appeals concluded that counsel's decision not to pursue the omitted claims was not deficient performance under *Strickland*, because appellate counsel had engaged in a process of "winnowing out" the arguments to be presented on appeal that was not unreasonable when

viewed from that *ex ante* perspective. See, *e.g.*, *ibid.* Indeed, the court not only examined each of the omitted claims from that perspective and found them wanting, but it also noted that, even if an appeal on one or the other ground would have had some chance of success, "counsel could also reasonably fear that the issue was more likely to distract the appellate court's attention from issues with a greater likelihood of success." *Id.* at 11a. As the court explained, "[a]lthough we now know that this court rejected all the issues raised on direct appeal, those issues were not frivolous" and their analysis "took a published opinion occupying 12 pages of text in the reporter to dispose of them." *Ibid.*

b. Petitioner asserts (Pet. 14-15) that there is a conflict in the circuits on the proper application of *Strickland* to an ineffective assistance of appellate counsel claim. Petitioner bases his argument on a purported difference between the Second and Seventh Circuits, which require a "comparison between merits of raised and unraised claims," Pet. 15 (citing *Gray* v. *Greer*, 800 F.2d 644 (7th Cir. 1986), and *Mayo* v. *Henderson*, 13 F.3d 528 (2d Cir. 1994), cert. denied, 513 U.S. 820 (1994)), and the Tenth Circuit, which requires an examination of "the merits of the omitted issue," Pet. 15 (citing *Banks* v. *Reynolds*, 54 F.3d 1508 (1995)).

Closer examination reveals that those cases do not state different legal standards, but simply deal with different factual contexts. In *Banks*, the court concluded that the omitted arguments were "clearly meritorious." 54 F.3d at 1515. There was, therefore, no need to examine the arguments made on direct appeal, because omitting a clearly meritorious claim was enough in the circumstances of that case to constitute

objectively deficient performance.[6] In contrast, the court in *Mayo* concluded that the omitted claim was "particularly strong." 13 F.3d at 534. But the court in *Mayo* then went on to compare the particularly strong claim that was omitted with the "extremely weak" claims presented on direct appeal, and found, based on that comparison, that the appellate attorney's performance was objectively deficient. *Ibid.* That no circuit split exists is well illustrated by *Cargle* v. *Mullin*, 317 F.3d 1196 (10th Cir. 2003), which harmonizes the holdings of *Banks* and *Mayo*. *Cargle*, 317 F.3d at 1202-1203 ("If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted

---

[6] Petitioner's contention (Pet. 17-18) that the court of appeals departed from its own "dead bang winner" standard in this case is mistaken. The Tenth Circuit has used the term "dead-bang winner" to refer to an omitted claim that is clearly meritorious, see *e.g.*, *United States* v. *Cook*, 45 F.3d 388, 395 (10th Cir. 1995), and the omission of such a claim may form a basis for a claim of ineffective assistance of appellate counsel. See *Cargle* v. *Mullin*, 317 F.3d 1196, 1202 n.4 (10th Cir. 2003) ("omission of a clearly meritorious issue can be a sufficient basis for such a claim"). That does not mean, however, that a decision on the merits is necessary to the determination of ineffective assistance claims. See *ibid.* ("This court recently rejected the idea that omission of a 'dead bang winner' issue is a necessary condition for prevailing on an appellate ineffectiveness claim. ") (citing *Neill* v. *Gibson*, 278 F.3d 1044, 1057 n. 5 (10th Cir. 2001), cert. denied, 537 U.S. 835 (2002)). In this case, because the court determined that there was no clearly meritorious issue that appellate counsel had omitted, the court had no occasion to use the "dead-bang winner" formulation. In any event, a claim that the court of appeals failed to follow its own precedent would not warrant further review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.") (citing *Smith*, 528 U.S. at 288, *Banks*, 54 F.3d at 1515-1516, and *Mayo*, 13 F.3d at 533).

2. Petitioner argues that the jury instructions on the Section 241 and Section 3631 counts permitted the jury to convict him for conduct that was protected by the First Amendment, see Pet. 19-27, and that a Section 844(h)(1) conviction may not be based on a Section 241 conspiracy, see Pet. 27-33. Those claims are not squarely before this Court in this case.

This case arises from petitioner's motion under Section 2255, in which he attempted to present claims that were defaulted on direct appeal. The court of appeals held—and petitioner does not dispute—that those claims were thus procedurally barred unless petitioner could show cause and prejudice to excuse his default. Pet. App. 4a. The court of appeals decided this case on the ground that petitioner was unable to make a showing of cause for the default, because he was unable to show that he received ineffective assistance of counsel.

In that posture, the only issue presented to the court of appeals was the case-specific one of whether petitioner received ineffective assistance of counsel on direct appeal. To resolve that question, the court of appeals did have to consider the merits of the claims that petitioner sought to raise, in order to determine whether counsel rendered ineffective assistance in fail-

ing to raise them. But the court did not ultimately have to resolve those claims.

For example, the court of appeals did not decide whether the Section 3631 jury instructions in this case were inadequate. Instead, the court concluded only that "[i]f there is a flaw [in the Section 3631 jury instructions], it is a subtle one," and that, although "[p]erhaps an appeal on this ground would have succeeded," counsel could also reasonably have concluded that other issues were more promising. Pet. App. 10a-11a. On the Section 241 count, the court did state that the instructions were "flawed," but it did not definitively resolve whether any error would have entitled petitioner to relief. Instead, it concluded only that counsel could have reasonably omitted the claim of instructional error on appeal, because the likelihood that the error would be considered harmless was "considerable." *Id.* at 13a. On the permissibility of applying Section 844(h)(1) based on the Section 241 conspiracy, the court concluded only that it was "not sure" that it would adopt petitioner's position in light of considerable arguments opposing it, *id.* at 17a, and that it "need not resolve" the issue definitively because "it was not so obvious at the time of [petitioner's] direct appeal that counsel's failure to raise [the issue] was unreasonable," *id.* at 18a.

In its present posture, this case therefore presents only the question whether the court of appeals erred in concluding that petitioner's appellate counsel was not ineffective. It does not present an appropriate opportunity for this Court to address the merits of the various substantive issues that petitioner seeks to present. Thus, even if resolution of the substantive issues identified by petitioner otherwise warranted this Court's re-

view, such review would better await a case in which the merits of those issues would be squarely presented and could be finally settled.

3. In any event, the substantive issues identified by petitioner would not warrant further review.

a. Contrary to petitioner's contention (Pet. 25-26), the Section 3631 jury instructions adequately ensured that petitioner could not be convicted for engaging in conduct protected by the First Amendment. In *Virginia* v. *Black*, this Court determined that "[i]ntimidation," which "is a type of true threat," is "constitutionally proscribable" when done "with the intent of placing the victim in fear of bodily harm." 538 U.S. at 360. The Section 3631 jury instructions in this case adequately conveyed to the jury that only conduct threatening use of physical force is proscribed. The jury was instructed that, to convict petitioner, it had to find that petitioner "*used force or threat of force*," and that "[t]he term 'force' includes the exercise and application of physical power" and "means power, violence, compulsion, or restraint exerted upon or against a person or thing." Pet. App. 8a, 9a. That is sufficient to ensure that the jury convicted petitioner only upon finding that he had used a "threat of force" as that term was understood in *Black*—*i.e.*, a threat that was intended to "plac[e] the victim in fear of bodily harm."

Petitioner also objects to the statement in the instructions that "to threaten or intimidate does not require the possibility of physical force or physical harm." Pet. 26 (emphasis omitted); see Pet. 24. As the court of appeals held, see Pet. App. 11a, that statement correctly informed the jury that it could convict if petitioner's cross burning amounted to a threat of physical force, even if petitioner did not actually intend to carry

out the threat. See *Black*, 538 U.S. at 360 (determining that a cross burner "need not actually intend to carry out the threat" in order for his conduct to be proscribable).

b. With respect to the Section 241 conviction, even if the instructions permitted conviction without requiring a threat of force and, as the court of appeals stated, were "flawed" for that reason, see Pet. App. 12a, the error was harmless. Petitioner was charged pursuant to Section 241 with conspiracy to "oppress, threaten, or intimidate" the Henrys "in the free exercise or enjoyment of" their housing rights. It is undisputed that the charged Section 241 conspiracy was a conspiracy to engage in the cross burning, which was itself the basis of the Section 3631 charge. As explained above, the instructions on petitioner's Section 3631 charge did require the jury to find use or threat of force as an element of the crime and explained that the force must be physical force. The jury's finding of guilt on that charge therefore shows that the jury determined that petitioner's cross burning exhibited physical force or the threat of physical force. Accordingly, the jury's finding on the Section 3631 count established that, even if the instructions on the Section 241 count failed to require proof that petitioner had conspired to use physical force against the victims and was flawed, the jury would have found that the object of the conspiracy was a "true threat"—*i.e.*, a threat of physical force against the victims. Contrary to petitioner's argument (Pet. 27), there is no danger that petitioner was convicted under Section 241 for conspiring to engage in conduct protected by the First Amendment. Further review of petitioner's First Amendment claims would therefore be unwarranted.

c. Nor would further review be warranted to determine whether a Section 241 conspiracy may be a predicate offense on which a Section 844(h)(1) conviction can be based. See Pet. 27-33. In *United States* v. *Colvin*, 353 F.3d 569, 576 (2003) (en banc), cert. denied, 543 U.S. 925 (2004), the Seventh Circuit held that Section 844(h)(1) could not be based on a Section 241 conspiracy. No other court of appeals, however, has ruled on that issue. The court of appeals in this case did not reach a final conclusion on that issue, although it did observe that there are substantial reasons not to "embrace *Colvin*." Pet. App. 17a. There is accordingly no conflict in the circuits on the question whether Section 241 may be a predicate for a Section 844(h)(1) conviction, and petitioner has made no showing that that question is of such exceptional importance that further review would be warranted even in the absence of a conflict.[7]

---

[7] Quoting the trial transcript, petitioner notes (Pet. 29) that, in response to argument, the trial court expressed doubt about whether Section 844(h)(1) could be based on a Section 241 predicate felony. Ultimately, however, the trial court determined that petitioner's argument was mistaken, and it declined to dismiss the Section 844(h)(1) count. The same district court again concluded in analyzing petitioner's Section 2255 motion that "petitioner's act of burning a cross was part of his conspiracy to burn a cross" because it was an overt act of the conspiracy. Pet. App. 40a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WAN J. KIM
Assistant Attorney General

JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
Attorneys

MARCH 2006

Supreme Court, U.S.
FILED
APR 17 2006
OFFICE OF THE CLERK

(2)

No. 05-787

IN THE
Supreme Court of the United States

October Term 2005

MICHAEL BRAD MAGLEBY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street, P.O. Box 850
Middletown, Maryland 21769
(301) 293-6822

MICHAEL WEIN
Attorney for Petitioner
7829 Belle Point Drive
Greenbelt, Maryland 20770
(301) 441-1151

TABLE OF CONTENTS

	Page
Introduction – This Case Presents an Excellent Opportunity for this Honorable Court to Establish Standards for Effectiveness Of Appellate Counsel	1
1. *Smith v. Murray* and Related Cases	2
2. The *Magleby* Case, Prior Tenth Circuit Case Law, and Present Circuit Court Split	4
3. Failure to Argue 'Flawed' Jury Instructions	8
4. Failure to Argue Whether Fire Is Used to Commit a Conspiracy	9
Conclusion	10

TABLE OF AUTHORITIES

Cases Cited

Anders v. California, 386 U.S. 738 (1967) 3

Avellar v. Dubois, 30 F. Supp. 2d 76 (D. Mass. 1998).....4

Bell v. Smith, 236 F. 3d 149 (4th Cir. 2000)(*en banc*) 5

Brandenburg v. Ohio, 395 U.S. 444 (1969).....8

Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003).....6,7

Claudio v. Scully, 982 F.2d 798, 805 (2nd Cir. 1992).....4

Evitts v. Lucey, 469 U.S. 387 (1985).....2,4

Fagan v. Washington, 942 F.2d 1155 (7th Cir. 1991).....5

Fern v. Gramley, 99 F. 3d 255, 257 (7th Cir. 1996).....4

Lattimore v. Dubois, 152 F. Supp. 2d 67 (D. Mass. 2001).....4

Neill v. Gibson, 278 F.3d 1044 (10th Cir. 2001).....5,6

People v. Wende, 25 Cal. 3d 436 (1979).....3

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).....8

Smith v. Murray, 477 U.S. 527 (1986).....1,2,3

Smith v. Robbins, 528 U.S. 259 (2000).....3,4

Strickland v. Washington, 466 U.S. 668 (1984).....1,4,5

United States of America v. Michael Brad Magleby, 420 F.3d 1136 (10th Cir., 2005), *rehearing en banc* denied Sept. 20, 2005.....*passim*

United States v. Cook, 45 F.3d 388 (10th Cir. 1995).....5,7

United States v. Lee, 6 F.3 1297 (8th Cir. 1993) (en banc).....9

United States v. McDermott, 29 F.3d 404 (8th Cir. 1994).....9

Watts v. United States, 394 U.S. 705, 707 (1969).....8

Statutes Cited

18 U.S.C. § 241 passim

18 U.S.C. § 3631 passim

Other Authorities

Lisa Griffin, "The Right to Effective Assistance of Appellate Counsel," 97 W. Va L. Rev. 1, Fall 1994 4

Introduction - This Case Presents an Excellent Opportunity for this Honorable Court to Establish Standards for Effectiveness of Appellate Counsel

The Government erroneously states that this Court previously concluded that *Strickland* applies to claims of ineffective assistance of appellate counsel, citing *dicta* in *Smith v. Murray*, 477 U.S. 527 (1986) and other cases. Pet. Opp. 11-15. But unlike the case presented here, neither *Smith* nor the other cases cited by the Government:

- Involved obvious, well-preserved issues based on law pre-existing the trial that appellate counsel had failed to present on direct appeal;
- Examined what 'form' of *Strickland* should be applied to such well-preserved claims based on prior existing law, a matter that is of public importance and to which a clear Circuit split exists; and
- Appreciated the adverse impact of the lack of guidance from this Court concerning standards for effective appellate counsel, resulting in the needless expenditure of scarce judicial resources on deficiently argued appeals.

The focus of the practicing criminal defense appellate attorney is necessarily narrow—appellate counsel can generally only argue those issues that are in the record and that have been objected to by trial counsel. Thus it is with this focus on the record and preserved objections that an effective appellate advocate depends. Indeed, there should be extremely few meritorious claims of ineffective assistance of appellate counsel from not presenting an unpreserved issue unless it is plain error. Most non-frivolous claims of ineffectiveness are likely to present circumstances such as this - where appellate counsel fails to present obvious, well-preserved issues from the trial.

This case, with its clear and well-preserved First Amendment and conspiracy law claims that were ignored by Petitioner's original appellate counsel, presents an excellent but rare opportunity for this Court to discuss this important matter in a way that is easily comprehensible for practitioners and lower courts alike. Without Certiorari, the

Circuit Courts of Appeals, as well as state courts who look towards this Court on how to apply the right to effective assistance of counsel, will continue to lack guidance on the standards governing criminal appellate attorneys' consideration of the law and record when winnowing out weaker arguments in favor of clear winners.[1]

1. Smith v. Murray and Related Cases

The Government contends that *Smith v. Murray*, 477 U.S. 527 (1986) has already addressed what standards apply to claims of ineffective assistance of appellate counsel. But a review of *Smith* finds no support for this contention.[2]

Smith v. Murray came out a year after *Evitts v. Lucey*, 469 U.S. 387 (1985), which specified standards that apply to claims of ineffective assistance of appellate counsel remained an open question. *Evitts*, at 392. *Murray* presented the question whether a prosecutor may elicit damaging testimony from a psychiatrist appointed at a homicide defendant's request to explore the possibility of presenting psychiatric defenses at trial (a claimed violation of the defendant's right against self-incrimination that at the time of defendant's original appeal was barred by a two-year old Virginia precedent).

But this Court did not reach this question, instead ruling that it is "self-evident that [Smith] has failed to demonstrate cause for his non-compliance with Virginia's procedures" in raising this claim during his direct appeal. *Murray*, at 533. [3] Not once in *Smith v. Murray* was the

---

[1] Mirroring the Tenth Circuit's factual error in its reported decisions below, the Government reports that the cross burning in this case occurred in 1996. Pet. Opp. 2; Pet. App. 2a, 22a, & 46a. In fact, the cross burning occurred during the 1998 Labor Day weekend, and Magleby was convicted and sentenced to 144 months beginning December 20, 1999. Pet 6; Pet. App. 24a (corroborated by court records).

[2] The Tenth Circuit never mentions *Smith v. Murray* in *Magleby*, belying the Government's claim that the court was "following the reasoning of *Murray*." Pet. Opp. 12.

[3] "[Defense] counsel may not make a tactical decision to forgo a procedural opportunity—for instance, to object a trial or to raise an issue on appeal—and then when he discovers that the tactic has been

previous *Evitts* case even cited. As reflected by the comments of a justice of this Court during oral arguments in *Murray*, "[w]e didn't grant certiorari on the ineffective assistance of counsel claim," which is also reflected in the briefs filed with this Court. Trans. Oral Argument, Mar. 4, 1985, *Smith v. Murray*, 1985 U.S. TRANS LEXIS 10, *24. *See also* Brief of Petitioner, *Smith v. Murray*, 1985 U.S. Briefs 5487. The brief mention of *Strickland* in a single paragraph in *Murray* is only *dicta* to illustrate that Petitioner's claims in that case could not have remotely reached a constitutional claim of ineffectiveness, since the well-established existing law in Virginia at that time **was against** such an argument being made in the direct appeal in that case.

Moreover, unlike the First Amendment and conspiracy law defenses ignored by appellate counsel in *Magleby*, the defendant's objections to the admission of the psychiatrist's testimony in *Murray* did not result in the conviction of a defendant who may be actually innocent. Thus the "imperative of correcting a fundamentally unjust incarceration" did not exist. *Murray*, at 536.

The underlying facts and holding in *Smith v. Robbins*, 528 U.S. 259 (2000) are similarly inapposite to the Questions Presented in this case. *Robbins* considered a highly specific question as to whether the State of California's procedure approved in *People v. Wende*, 25 Cal. 3d 436 (1979) violated the system of no-merit briefs that this Court had adopted and approved in *Anders v. California*, 386 U.S. 738 (1967). *Robbins* was a criminal defendant who waived his right to counsel at trial and represented himself. Having failed to make proper objections after a knowing and voluntary waiver of the right to counsel, there existed **no preserved arguments at trial to raise on appeal.** As a result, Smith's appointed appellate attorney sought permission to file a "no-merit brief" under *Wende*, and the appeal was affirmed.

---

unsuccessful, pursue an alternative strategy in federal court...Procedural defaults of this nature, are, therefore, inexcusable, and cannot qualify as 'cause' for purposes of federal habeas corpus review." *Murray*, at 534 (*quoting Reed v. Ross*, 468 U.S. 1, 14 (1984)).

Robbins, a. ..*1*. This left Robbins with only a proceeding for habeas review to challenge his appointed appellate counsel's decision to file a "no-merit brief." Because the Court of Appeals for the Ninth Circuit concluded there existed two 'arguable' issues that should have been presented, the Ninth Circuit presumed prejudice and ordered a new appeal. *Id.* at 268. As part of the remand by this Court to clarify the level of merit associated with the 'arguable' issues, this Court noted in its remand order that prejudice should not be presumed in non-merit briefs such as those under *Anders* and *Wende*, and cited the *Strickland* standard as appropriate, so that Robbins "must show that his counsel was objectively unreasonable in *failing to find arguable issues to appeal*—that is, that counsel unreasonably failed to discover non-frivolous issues and to file a merits brief raising them...[t]hat is, he must show a reasonable probability, that, but for his counsel's unreasonable *failure to file a merits brief*, he would have prevailed on his appeal." [Emphasis Added] *Id.* at 285.

Numerous authorities show that the lower courts and legal community believe that the issue of what standards govern ineffective assistance of appellate counsel has not been examined by this Court since *Evitts* left open the question. *See e.g., Fern v. Gramley*, 99 F. 3d 255, 257 (7th Cir. 1996); *Claudio v. Scully*, 982 F.2d 798, 808 (2nd Cir. 1992) (*Citing Evitts*, "[t]he Supreme Court has not yet decided this issue."); *Lattimore v. Dubois*, 152 F. Supp. 2d 67, 85 (D. Mass. 2001); *Avellar v. Dubois*, 30 F. Supp. 2d 76, 88 (D. Mass. 1998) (*Citing Evitts*, "[t]o date, the [Supreme] Court has not revisited this issue."). *See also* Lissa Griffin, "The Right to Effective Assistance of Appellate Counsel," 97 W. Va L. Rev. 1, 18 (1994) (Not citing *Smith v. Murray*, and writing that: "the Supreme Court clearly stated in *Evitts* that since the State did not challenge the finding of counsel's deficiency, it "need not decide the content of appropriate standards for judging claims of ineffective assistance of appellant counsel. *Cf. Strickland v. Washington.*' As at least one judge has noted, '[a]rguably, the 'cf.' cite to *Strickland* implies that the appellate standard might be different.'") [Citations Omitted]

2. The *Magleby* Case, Prior Tenth Circuit Case Law, and Present Circuit Court Split

As pointed out by the Petition, the Tenth Circuit's decision in *Magleby* "contradicts the dead-bang winner standard in *United States v. Cook*, and *Neill v. Gibson*. It also contradicts *Strickland v. Washington*, which stressed the need for an 'objective' standard for ineffective assistance of trial counsel." [Citations Omitted] (Pet. 18) Having failed to follow its own "dead-bang winner" precedent, *Magleby* now leaves it unclear what standard of review the Tenth Circuit uses for ineffective assistance of appellate counsel claims. Nevertheless, there is still be a Circuit split existing between those Circuits that follow the "dead-bang winner" approach to ineffective assistance of appellate counsel claims and those Circuits that have not adopted the "dead-bang winner" standard, either by adopting a requirement at examining eleven factors as the Sixth Circuit has done, or simply following a straight *Strickland* approach. Pet. 14-15.[4] Additionally, the Circuits differ in how the determination of ineffective assistance of appellate counsel works in practice, either by comparing the relative strength of the raised and omitted claims, or a determination that prejudice results from solely examining the omitted issue.[5] Pet. 15.

---

[4] *See also Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either [meritorious] claim, instead raising weaker claims...No tactical reason—no reason other than oversight or incompetence -has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had."); *Bell v. Smith*, 236 F. 3d 149, 180 (4th Cir. 2000)(*en banc*)(Motz, dissenting) ("As demonstrated within, well prior to Bell's 1994 trial, Supreme Court precedent required that trial courts express on-the-record findings before closing a courtroom...Here, Bell's trial counsel did properly object to this clear constitutional violation, and yet appellate counsel still did not find this issue important enough to brief. Instead, appellate counsel chose to assert evidentiary challenges that had no likelihood of success. Appellate counsel's failure to raise the one issue that would have been a "dead-bang winner" renders his assistance constitutionally ineffective.")

[5] As opposed to the Government's erroneous claim that the Circuits have 'harmonized' the examination process to allow those most 'meritorious' claims to be dealt with through dead-bang winner

The Government misstates the holding of *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003), claiming that a Court does not have to decide the merits to determine ineffective assistance of appellate counsel claims. Pet. Opp. 14, fn. 6 In fact, *Cargle* illustrates that the Tenth Circuit in *Magleby* not only did not follow its own *en banc* precedent in *Neill v. Gibson*, but that it adopted a position that contradicted *this Court* in *Strickland*, because the lower court *does not now have to ascertain the merits of the omitted claim.*

In *Cargle v. Mullin*, 317 F.3d 1196 (2003), a question existed as to whether the federal courts should defer to an Oklahoma Court of Criminal Appeals (OCCA) decision when deciding habeas relief under the Anti-terrorism Effective Death Penalty Act. As noted in the Petition for Writ of Certiorari, Oklahoma has a statute on ineffective assistance of appellate counsel that does not follow *Strickland*. (Pet. Ftnt. 2) Observing that the "deferential standard of review does not apply if the state court employed the wrong legal standard in deciding the merits of the federal issue," the Tenth Circuit held, "[t]he OCCA applied the wrong standard here." *Cargle*, 317 F.3d at 1202.

While observing that *Neill v. Gibson* permitted a litigant to establish ineffective assistance of appellate counsel through *either* "dead bang winner" analysis or

---

examination, an examination of those Courts that require a comparison between raised and un-raised claims shows that they do not follow "Dead-bang winner" approach, thus requiring even the most obvious preserved issues to be subject to review as to the relative strength of the merits of the un-raised versus raised claims, before permitting habeas relief. *Cf. Claudio v. Scully*, 982 F.2d 798 (2nd Cir. 1992) (Not requiring comparison of un-raised versus raised claims on appeal, nor adopting "dead-bang winner" approach, yet granting habeas relief as "[n]o reasonably competent attorney should have missed the ...claim"). *See also United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) ("[W]e conclude that although counsel presented several strong but unsuccessful claims on direct appeal, see *Cook I, 949 F.2d at 289*, counsel omitted a "dead-bang" winner--i.e., the conflict of interest issue--and thus rendered ineffective assistance. The conflict of interest issue was obvious from the trial record as the inappropriateness of the trial court's order "leaped out upon even a casual reading of [the] transcript.")

traditional *Strickland* analysis, *Cargle* went further. It noted that under Oklahoma law, "the merits of the omitted claim need not even be considered in evaluating whether appellate counsel's performance was deficient." *Id.* at 1204. "[P]etitioners must establish not only a meritorious omitted issue but also an improper motive or cause behind counsel's omission of the issue." *Id.* Thus, the Tenth Circuit held,

> "[i]t is clearly wrong, as a matter of federal law, to require as a necessary condition for relief under *Strickland*, something beyond the obvious merit of the omitted claim. The very focus of a *Strickland* inquiry regarding performance of appellate counsel upon the merits of omitted issues, and *no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law.* A sufficiently meritorious omitted claim certainly can, by itself (or in relation to other issues that counsel did pursue), establish constitutionally deficient performance by appellate counsel. Because the OCCA's analysis of petitioner's appellate ineffectiveness allegations deviated from the controlling federal standard, *see Cargle*, 947 P.2d at 588-589, (repeatedly invoking principle contrasted with *Strickland* here), it is not entitled to deference." [*Emphasis Added*] *Id.* at 1205.

If this Court had previously clearly stated the standards to be used to determine ineffective assistance of appellate counsel, the Tenth Circuit would have simply followed this Court's case law when it reviewed the matter below. Yet the Tenth Circuit in *Magleby* not only failed to follow either its 'dead-bang winner' analysis in *Cook*, or *Cargle's* teaching that not examining the merits of an omitted issue "is clearly wrong as a matter of federal law" and violates *Strickland*, but concluded that it did not have to adjudicate the merits of Magleby's well-preserved and obvious claims. Pet. 17, 28. *Cargle* thus further illustrates the urgent need for this Court to set clear and comprehensive standards on this important issue.

3. Failure to Argue 'Flawed' Jury Instructions

As the Government concedes, the Tenth Circuit avoided resolving Magleby's claims that the trial court's instructions were reversible errors under the First Amendment. Pet. Opp. 15-16. Instead, the Tenth Circuit speculated that counsel could have "reasonably feared" that these issues would distract the appellate court from other issues and that pertinent caselaw was absent from the Supreme Court or the Tenth Circuit to support such claims at the time of the direct appeal. Pet. App. 11a, 14a.

Neither of these arguments is supported by the record or the law. There is nothing in the record to show that appellate counsel considered raising the First Amendment and conspiracy law claims in Magleby's direct appeal, let alone that he weighed their merits versus the numerous unsuccessful issues that he did present. The affidavit of Magleby's original trial counsel shows that appellate counsel never even conferred with trial counsel before entering his appearance, much less weighed the existing law behind Magleby's defense that he lacked the intent to threaten or inflict bodily harm. Pe.. App. 109a-118a And the existing law from this Honorable Court at the time of the trial and the original direct appeal had long established the principle that the First Amendment only permits conviction only for threatening or obnoxious speech when it is shown that the speaker intends a "true threat." *See* caselaw cited in Petition for Writ of Certiorari, pp 20-22

"Thus the Government may prosecute a cross burner based on the threatening message that he conveys only when it proves that he intends - by that message - to incite imminent lawless action or cause fear of such imminent force or violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969). "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969). "Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavored topics." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). What makes it even more obvious that this was the existing

law from this Court at the time of Magleby's direct appeal was that the Eighth Circuit had already applied these long-established principles in nearly identical cross-burning cases. *United States v. McDermott*, 29 F.3d 404 (8th Cir. 1994); *United States v. Lee*, 6 F.3 1297 (8th Cir. 1993) (en banc).

Not only did the trial court fail to explain that Magleby could only be convicted if he intended a true threat of imminent lawless action or to cause fear of such action, it told the jury that "oppress, threaten, or intimidate" should be understood in their "ordinary" meaning, that to threaten or intimidate does not require the possibility of physical force or harm, and that an intent to harass was sufficient to establish the felonious conduct. Although the Tenth Circuit admitted that these instructions were "flawed" under § 241, it failed to observe that the judge repeated them when he later explained § 3631 to the jury. Pet App. 8a-14a, 87a, 94a-95a. A more prejudicial misstatement of First Amendment requirements under this Court's precedents, existing both at the time of trial and the direct appeal, is difficult to fathom.

4. Failure to Argue Whether Fire Is Used to Commit a Conspiracy

That fire is not used to conspire should be obvious. There is no need to let this issue 'percolate' as the question involved is not a subject of intense legal debate, even though the Government still insists that it can seek ten year penalty enhancements for **both** the underlying charge and a conspiracy to commit the underlying charge, which has real-world consequences for numerous defendants, including Magleby. This illustrates the meritoriousness of the omitted issue for the Petitioner, and therefore the ineffectiveness of appellate counsel involved, in addition to being a question of importance because of the practical impact.

The trial judge hit the nail on the head when he observed that "just plain common sense tells me that you haven't used fire in reaching an agreement. I can't even get my mind there on it. You don't use fire to reach an agreement, even though the agreement anticipates the use of fire." Pet. 29. The judge **never** repudiated this sentiment, nor did he "determine[ ] the petitioner's argument was

mistaken" as the Government erroneously claims. Pet. Opp. 9, fn. 7. The judge acknowledged a few minutes later that his initial legal research was mistaken because "I was looking at Section 371 on conspiracy...Frankly, it appears to me that it makes Mr. [Leland] Jorgensen's argument about the legality, the legal propriety, of Count 3 a little stronger. But we'll take it up at sentencing and hopefully get this whole thing sorted out at sentencing. I didn't want to leave you with that misadvice." Pet. App. 108a-109a.

Conclusion - Certiorari is Appropriate Here

An unfortunate byproduct of the lack of specificity from this Court as to what constitutes "ineffective assistance of appellate counsel" is that the bright-line rule in *Evitts*, (that when an appellate counsel defaults on an appeal, it constitutes a denial of due process and therefore ineffectiveness), has become the overarching concern by the appellate courts, to the exclusion of all other elements of effective appellate advocacy. But the only incentive that exists under this Court's precedents is for appellate courts to insist that a likely incompetent attorney, even one who has repeatedly missed deadlines and disregarded procedures, provide some sort of brief, no matter how inadequately the attorney presents the obvious, well-preserved issues. *See* Affidavit of Magleby's Trial Counsel, Pet. App. 110a-118a. This case provides an excellent opportunity for this Court to establish standards for effective appellate counsel.

PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street, P.O. Box 850
Middletown, Maryland 21769
(301) 293-6822

MICHAEL WEIN
Attorney for Petitioner
7829 Belle Point Drive
Greenbelt, MD 20770
(301) 441-1151